COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 16-P-1044 ~~2015-P-0314~~

COMMONWEALTH OF MASSACHUSETTS,
Appellant,

V.

MOSES EHIABHI,
Defendant-Appellee

BRIEF AND RECORD APPENDIX FOR THE COMMONWEALTH ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

SUFFOLK COUNTY

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I. Whether the sentencing judge erred when she sentenced the defendant pursuant to G.L. c. 94C, §§ 32A(a) & (b) where the defendant was charged with, and convicted of, violating G.L. c. 94C, §§ 32A(c) & (d).

II. Whether the sentencing judge improperly allowed the defendant's motion to stay his sentence where her ruling that the defendant had a meritorious suppression issue on appeal was predicated on factual findings that expressly contravened the factual findings made by the motion judge who heard the defendant's motion to suppress and assessed the credibility of the witnesses at the motion hearing.

STATEMENT OF THE CASE

This is the Commonwealth's appeal of the sentence, and the stay of that sentence, imposed on the defendant, Moses Ehiabhi, in the Suffolk Superior Court.

On January 13, 2014, a grand jury returned indictments charging the defendant with possession of a class B controlled substance, to wit, cocaine, with intent to distribute, in violation of G.L. c. 94C,

§ 32A(c), and as a subsequent offense in violation of G.L. c. 94C, § 32A(d); operating under the influence of a controlled substance, in violation of G.L. c. 90, § 24(1)(a)(1); resisting arrest, in violation of G.L. c. 268, § 32B; and assault and battery on a police officer, in violation of G.L. c. 265, § 13D (C.A. 1-5).[1]

On August 20, 2014, the defendant filed a motion to suppress evidence (C.A. 11). On November 4, 2014, the Honorable Mary Ames ("Judge Ames" or "the motion judge") held an evidentiary hearing on the defendant's motion, and denied it on November 5, 2014 (C.A. 12; Add. 65-84).

The defendant was tried by a jury, the Honorable Elizabeth Fahey ("the sentencing judge") presiding, from December 12 to 17, 2014 (C.A. 13). On December 17, 2014, Judge Fahey allowed the defendant's motion for a required finding of not guilty as to the charge

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[1] References to the Commonwealth's appendix will be cited as (C.A. [page]) and to its addendum as (Add. [page]). References to the transcripts of the motion to suppress will be cited as (M.Tr. [volume]:[page]) and to exhibits entered at the motion to suppress as (M.Exh. [number]). References to the trial transcripts will be cited as (Tr. [volume]:[page]) and to trial exhibits as (Exh. [number]).

of resisting arrest (C.A. 13; Tr. 3:162). That same day, the jury acquitted the defendant of operating a motor vehicle under the influence of a controlled substance, and convicted him of possession of a class B substance with intent to distribute and assault and battery on a police officer (C.A. 13; Tr. 4:26-27).

Also on December 17, 2014, the same jury convicted the defendant of being a subsequent offender (C.A. 14; Tr. 4:63-64).

On December 19, 2014, Judge Fahey sentenced the defendant to two years to two years and one day for his conviction of possession of a class B substance with the intent to distribute and, on his conviction of assault and battery on a police officer, two years of probation consecutive to his sentence for possession of a class B substance with intent to distribute (C.A. 14; Tr. 5:42-43). The judge stayed the defendant's sentences pending appeal (C.A. 14; Tr. 5:42-43).

Also on December 19, 2014, the Commonwealth filed a notice of appeal of the defendant's sentence and the stay of his sentence (C.A. 14, 33-34). The defendant

filed a notice of appeal of his convictions the same day (C.A. 14).

On March 2, 2015, Judge Fahey filed a "report of correctness of sentence to the Appeals Court pursuant to Mass. R. Crim. P. 34 and G.L. c. 231, § 111" (C.A. 14; Add. 87-92).

STATEMENT OF FACTS[2]

A. The Motion to Suppress.[3]

At approximately 2:00 a.m. on June 27, 2013, Boston Police officers Steven Dodd and Andrew Hunter, both of the drug control unit, were on patrol in the Roxbury section of Boston (Add. 70-71; M.Tr. 1:11-13;

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[2] In anticipation of the issues that may be raised by the defendant in his cross-appeal, the Commonwealth has included in its statement of facts a brief recitation of the evidence at the hearing on the motion to suppress and at trial.

[3] Judge Ames explicitly credited Officer Dodd's testimony (Add. 72; M.Tr. 2:7). Thus, the Commonwealth has supplemented Judge Ames' findings with Officer Dodd's testimony where necessary to provide a full narrative. *See Commonwealth v. Jones-Pannell*, 472 Mass. 429, 431 (2015). The Commonwealth has inserted citations to evidence elicited at the hearing that supports the judge's findings; the evidence at the hearing is contained in motion transcript volume 1, and Judge Ames' findings are contained in motion transcript volume 2. To the extent that a fact as recited was not explicitly found by Judge Ames, but added for supplementation, it is denoted solely by reference to motion transcript volume 1.

2:5-6). It was an area that they knew to have an "excess of violence, violent crime, crime involving firearms, crime involving drugs, and theft of property including theft of motor vehicles" (Add. 72; M.Tr. 1:14; 2:7).

As Officer Dodd drove the officers' unmarked police car on Norfolk Avenue, a Dodge Charger entered the roadway in front of the officers from a side street just before Burrell Street (Add. 72; M.Tr. 1:14-15; 2:7). At first, the Charger veered into the opposite, on-coming lane of traffic on Norfolk Avenue, and then it fully began traveling in that lane in the wrong direction (Add. 72; M.Tr. 1:15-16; 2:7). When the Charger came close to colliding with a light pole near the intersection of Norfolk Avenue and Shirley Street, the officers decided to stop it (Add. 72-73; M.Tr. 1:16; 2:7-8). Officer Dodd turned on his cruiser's lights, and, in response, the Charger, which was still driving the wrong way in the opposite lane of traffic, pulled over to the left-hand curb at the intersection of Norfolk Avenue and Langdon Street, still facing on-coming traffic (Add. 72-73; M.Tr. 1:16; 2:7-8).

Officer Dodd approached the driver while Officer Hunter approached the passenger (Add. 73; M.Tr. 1:16; 2:8). When Officer Dodd reached the driver's window, he saw that the defendant was driving the car, and that a woman, Katelyn Courts, was sitting in the passenger seat (Add. 73; M.Tr. 1:16-18; 2:8). The officer was immediately confronted with the odor of burnt marijuana coming from inside the car, and he noticed that the defendant's eyes were red and glassy (Add. 73; M.Tr. 1:16-18; 2:8). During initial conversation with the defendant, Officer Dodd also noticed that the defendant's speech was slurred (Add. 73; M.Tr. 1:17; 2:8). Ms. Courts was not wearing her seat belt and likewise displayed "obvious signs of intoxication" (Add. 73; M.Tr. 1:21; 2:8).

Officer Dodd asked the defendant to produce a license and registration (Add. 73; M.Tr. 1:19-20; 2:8). The defendant produced his license and a rental agreement for the Charger, which had a return date of June 11, 2013, making the car overdue for return (Add. 73; M.Tr. 1:19; 2:8). Officer Dodd asked whether anyone had been smoking marijuana; Ms. Courts said, "yes, we were smoking before leaving Burrell

Street" (Add. 73-74; M.Tr. 1:21; 2:8-9). Officer Dodd asked her to produce identification, and she produced a Massachusetts identification card, but not a license (Add. 74; M.Tr. 1:22; 2:9). As he was speaking with the defendant and Ms. Courts, Officer Dodd noticed, in plain view in the center console of the Charger, a Pepsi bottle, inside of which was a rolled up sandwich bag (Add. 74; M.Tr. 1:23; 2:9; M.Exh. 1). This was significant to Officer Dodd, as he had previously recovered drugs packaged in a similar manner (M.Tr. 1:23).

Based on all he had seen, smelled, and heard, Officer Dodd formed the opinion that the defendant was operating while under the influence of marijuana and asked the defendant to step out of the car so that he could further determine his intoxication level[4] (Add. 74; M.Tr. 1:25; 2:9). He also determined at that time that he would not permit the defendant to continue operating the motor vehicle, as it would have put the public in danger (Add. 74; M.Tr. 1:25-26;

[4] Judge Ames "credit[ed] specifically, this testimony, [that Officer Dodd ordered the defendant from the car] in order to determine - further determine the intoxication level of the [d]efendant]" (Add. 74; M.Tr. 2:9).

2:9).[5] At the time that Officer Dodd ordered the defendant from the car, however, he had not yet determined whether he was going to arrest him for operating under the influence of marijuana, even though he had probable cause to do so (Add. 74-75; M.Tr. 1:25; 2:9-10).

Additionally, because: (1) he believed that the defendant to be impaired by marijuana; (2) there was a question whether the defendant had the lawful authority to operate the car given the expired return date of the rental agreement; (3) Ms. Courts likewise appeared intoxicated and could not produce a valid driver's license; and (4) the location of the stop was, in the officer's experience, an area that experienced property crimes including motor vehicle larceny, Officer Dodd determined that the proper course was to tow the Charger for safekeeping purposes (Add. 75; M.Tr. 1:25-27; 2:10).

As the defendant stepped out of the car, he purposefully moved away from Officer Dodd and began to

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[5] On this point, Judge Ames "credit[ed] the decision of the officer, and [found] that it is an entirely reasonable decision and well founded, given the state of the evidence" (Add. 74; M.Tr. 2:9).

look around in an uneasy fashion. This caused the officer concern, particularly in light of the size of the defendant, who stood approximately 6'5" and weighed 300 pounds (Add. 76; M.Tr. 1:28-29; 2:11). Given the hour, the location, and the defendant's actions as he got out of the car, Officer Dodd decided to pat-frisk the defendant (Add. 76; M.Tr. 1:28-29; 2:11). Because of the defendant's size, Officer Dodd was unable to get "completely around [the defendant's] waist" during the frisk (Add. 76; M.Tr. 1:30; 2:11). After he completed the pat-frisk as best he could, Officer Dodd asked the defendant to step to the rear of the car where Officer Hunter was standing and announced that he was going to conduct an inventory search of the Charger prior to it being towed (Add. 76; M.Tr. 1:30; 2:11).[6]

When Officer Dodd went into the car, he saw inside of Ms. Court's wide-open purse a glass pipe that he knew from his experience to be used to smoke marijuana, and a box of Glad sandwich bags, which he knew from his experience to be used for street level

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[6] A copy of the Boston Police Department inventory policy was entered as Motion Exhibit 3 (M.Tr. 1:31).

drug sales (Add. 76-77; M.Tr. 1:33-35; 2:11-12). By this time, Boston Police Sergeant Paul Quinn had arrived and was assisting the officers (M.Tr. 1:35). As Sergeant Quinn continued with the inventory search, he found a thumbtack with what appeared to be a white residue inside of the Glad sandwich box (Add. 77; M.Tr. 1:35; 2:12). In Officer Dodd's experience, he knew that thumbtacks were used to break pieces of crack cocaine (Add. 77; M.Tr. 1:35; 2:12).

As he was conducting the inventory search, Officer Dodd heard Officer Hunter ask the defendant about some bumps that Officer Hunter had seen in the defendant's shirt pocket (Add. 77; M.Tr. 1:38-39; 2:12). In response, the defendant shoved Officer Hunter and began running up and across Norfolk Street towards a field (Add. 77; M.Tr. 1:38-39; 2:12). The officers gave chase and shouted at the defendant to stop (Add. 77; M.Tr. 1:40; 2:12). As the defendant approached the field, he reached into his pocket and threw items on the ground (Add. 77-78; M.Tr. 1:40-41; 2:12-13). The officers caught up with the defendant in the field and put him on the ground (Add. 78; M.Tr. 1:41; 2:13). The defendant refused the

officers' commands to comply and, as they attempted to put handcuffs on him, he continued to keep one hand underneath his body and push his body up, making it difficult for the officers to restrain him (Add. 78; M.Tr. 1:41-42; 2:13). As a result, Officer Dodd had to punch the defendant in the face and, since his flashlight was in his hand, he gave the defendant a laceration to his nose (Add. 78; M.Tr. 1:42-43; 2:13). During the struggle, the defendant spit out a bag containing what appeared to the officers to be a rock of crack-cocaine (Add. 78-79; M.Tr. 1:42-43; 2:13-14).

After the officers finally subdued the defendant, they retraced his steps and found, from the area where they had seen him making throwing motions, seventeen bags of crack cocaine, all the same size and packaged the same as the one he spat from his mouth (Add. 78-79; M.Tr. 1:44-45; 2:13-14). They also found a set of keys for the Charger (Add. 78-79; M.Tr. 1:45; 2:13-14). During booking, $265 was recovered from the defendant (Add. 79; M.Tr. 1:51; 2:14).[7]

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[7] The defendant called his father, who testified that, when he (the father) asked the defendant why the car had not been returned in a timely fashion, the defendant responded that he had called the rental car

Judge Ames ruled that, given their observations of the erratic operation of the Charger, the officers had reasonable suspicion to stop it (Add. 81; M.Tr. 2:16). Once the officers interacted with the defendant and Ms. Couch, they had probable cause to arrest the defendant for operating a motor vehicle while under the influence of marijuana, even if the officers had not at that moment determined that they were going to arrest the defendant for that crime (Add. 75, 81; M.Tr. 2:10, 16). Judge Ames also ruled that because they had probable cause to believe that the defendant was impaired; that Ms. Couch was likewise impaired and did not have a license; that there was uncertainty regarding the defendant's authority to use the car; and the car would have been left in an area that would have put it at risk for vandalism or theft, the officers permissibly elected to tow the Charger and conduct an inventory search (Add. 81-82; M.Tr. 2:9-11, 16-17). She further found

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agency and extended the rental period to June 28 (Add. 80; M.Tr. 1:88-91, 93-94; 2:15). Judge Ames did not credit the testimony that the defendant called the agency, particularly as there was no documentary evidence to support the testimony (Add. 80; M.Tr. 2:15).

that the officers' decision and resulting search of the car was in conformance with the Boston Police Department tow and inventory policy (Add. 82; M.Tr. 2:17; M.Exh. 3). She specifically found that the inventory search was non-pretextual and was done for non-investigatory purposes, namely,

> public safety concerns and by concerns of the danger of theft or vandalism to a vehicle left unattended, particularly in the circumstance, given the nature of the area where it would be unattended.
>
> The Court finds that the officers had no alternative where the driver had been arrested and for erratic operation, and where the passenger's license had been suspended.
>
> Even in the event that officers - and the Court does find that the officers had probable cause to arrest - even if it was in the officer's mind that they were unclear on whether they would arrest at that time, the Court finds that the officers still had no alternative due to the obvious impairment of the driver.

(Add. 82-83; M.Tr. 2:17-18).

Finally, Judge Ames found that the seizure of the items from the car was proper, as it was done pursuant to the lawful inventory search, that the seizure of the crack cocaine and keys from the field was proper, as they had been abandoned by the defendant, and that

the money recovered from the defendant was properly recovered incident to his arrest (Add. 83; M.Tr. 2:18).

B. The Trial.

The evidence at trial was generally the same as was presented at the motion to suppress, with exceptions discussed, *infra* pp. 19. In addition to testimony from Officers Dodd and Hunter and Sergeant Paul Quinn regarding the stop of the Charger, the defendant's assault on Officer Hunter, and the resulting chase and recovery of eighteen bags of crack cocaine, the Commonwealth called Detective Robert England, who testified as a drug expert (Tr. 3:121-47). He testified that, in his experience, it would be inconsistent for a purchaser of crack cocaine to purchase eighteen individual bags of crack cocaine (Tr. 3:139).

The defendant called his father, who testified that, when he went to retrieve the Charger after it had been towed by the police, he found that various pieces of the car's interior such as the dashboard, door panels, and center console had been removed and the back seat had been torn by a knife (Tr. 3:177).

The defendant also testified. He said that, on the night he was arrested, he had been driving his cab when a friend named Devon called and asked him to come over to her house on Bell Street (Tr. 3:191-93). He dropped off the cab, got into the rented Charger, and picked up Ms. Courts and went to Devon's house (Tr. 3:192-95). Before they went into Devon's house, he and Ms. Courts ate some Jamaican beef patties, after which Ms. Courts put the wrapper and napkin into the bottle that was in the car (Tr. 3:195-98). Inside of Devon's house, people were smoking marijuana, although the defendant said he did not (Tr. 3:201-02). When the defendant and Ms. Courts left the party at approximately 1:50 a.m., the defendant had to drive down Burrell Street and then Norfolk Avenue in order to drop Ms. Courts off at her house (Tr. 3:202-03). He testified that he was not speeding and did not almost hit a light pole, but that he had to drive into the left hand lane of traffic because of cars that were parked on the right hand side of Norfolk Street (Tr. 3:202-03).

He also testified that, upon being pulled over, he told the police that his rental agreement had been

extended to the following day (Tr. 3:204). He followed all of the officers' directives to get out of the car, and the officers thoroughly searched him (Tr. 3:204-09). The officers were initially casual, but then Officer Dodd gave Officer Hunter a signal, and Officer Hunter slammed the defendant into the wall (Tr. 3:209). Because the defendant was scared, he did "like a swim move" through Officer Hunter and ran until they jumped onto his back in the field (Tr. 3:209-12). As the officers were on top of him, Officer Dodd hit him a couple of times in the face with a flashlight (Tr. 3:213). He said that he did not have any cocaine on him that night and did not throw or spit out anything (Tr. 3:215-16). He also did not see the sandwich bags or the thumbtack that was in Ms. Courts' purse (Tr. 3:216).

C. Sentencing.

After the defendant was convicted of both the underlying crime and the subsequent offense charges, the Commonwealth moved for a sentence of five years to five years and one day, noting that the charge carried a mandatory minimum sentence of three and one half years (Tr. 4:65). In response, the judge said that

she believed the mandatory minimum sentence was two years (Tr. 4:65-67). The prosecutor explained that, because the defendant had possessed crack cocaine, he had been indicted under G.L. c. 94C, §§ 32A(c) & (d), which carries a minimum mandatory sentence of three and a half years, as opposed to G.L. c. 94C, §§ 32A(a) & (b), which carries a minimum mandatory sentence of two years (Tr. 4:67-72).

The prosecutor cited *Cedeno v. Commonwealth*, 404 Mass. 190 (1989), which outlined the statutory distinction between §§ 32A(a) & (c) and which also upheld the statute against due process challenges. The prosecutor pointed out, in response to the judge's question about who decided to indict the case under § 32A(c) and opposed to § 32A(a), that *Cedeno* specified said that, in enacting the statute, the Legislature presented the District Attorney with a range of charging options (Tr. 5:2-8).

Notwithstanding the prosecutor's argument, the judge said,

> I don't mean to suggest that it was improper. But all of the factors that you are referring to are simply the elements of both [§§ 32(b) and 32(d)]. And so you do have, according to *Cedeno*, have the

> discretion. It seems to me, frankly, that the SJC would not accept that position anymore without a difference in the elements between [§§ 32(b) and 32(d)] . . .
>
> The SJC would not permit two different statutes . . .
>
> It seems to me that for a difference in sentences there should be some elemental modifying elements of the crime. There should be some distinction besides the prosecutor's discretion to be eligible to receive its more than 50 percent more in terms of time. Two is a minimum on (b), 3½ is the minimum on (d). And to be eligible to receive almost twice the length of time I don't think the SJC would accept that without some difference that to be proved to the jury to make him eligible for that larger, longer sentence . . . .
>
> . . . .
>
> I don't think the SJC would rule the same way. Frankly, I think they would reverse *Cedeno*.

(Tr. 5:10-14). When the prosecutor asked that "the Court to make a ruling based on the law as it is now. I think that at this point the law, that *Cedeno* is still good law," the judge responded, "it is" (Tr. 5:14). Nonetheless, the judge sentenced the defendant under § 32A(b) (Tr. 5:18).

The defendant also moved to stay his sentence, arguing that the motion to suppress was improperly denied because the stop and inventory search had been

pretextual (Tr. 5:18-21). In opposition, the prosecutor argued that the sentencing judge had not heard the evidence at the motion to suppress and that there was evidence that came out at the hearing on the motion to suppress that went to the issue of the stop that did not come out at trial (Tr. 5:25-32). For example, the sentencing judge did not hear that Ms. Courts had said that she and the defendant had just smoked marijuana or the more detailed evidence that the rental agreement had expired (Tr. 5:26-27). The prosecutor also stressed that the defendant would pose a risk of committing a new crime while free during pendency of the stay, pointing to the fact that he had previously been convicted in Federal Court of distribution of crack cocaine, and while on supervised relief from that conviction, was rearrested for the instant crime (Tr. 5:25, 31-32).

The sentencing judge allowed the defendant's motion, stating,

> I am prepared to state that I find that the stop, if not alone, was pretextual, but at least the inventory search was pretextual.
>
> I've reviewed the officer's testimony a couple of times and I was amazed when I was hearing it, the officer stopped the car

> because it had slightly crossed the median line. They didn't give any testimony about other cars the way Mr. Ehiabhi did.
>
> Most often I've heard testimony from other officers when they are suspicious that someone is driving improperly they'll follow for some distance to make sure that there's some issues. That didn't happen here.
>
> So they stop him. The officers both say that they have a strong odor of burnt marijuana, and he had glass eyes and slurred speech. Even Officer Hunter, who was at the passenger side, said that. And we don't even know how he could have seen [the defendant's] eyes if he's looking at Police Officer Dodd at the door, his door.
>
> But, in any event, it's clear, uncontroverted that Officer Dodd asks him to step out so he can evaluate more any impairment. I think that's basically what he said. He had not decided to arrest [the defendant] or charge him with operating under. And he does a pat frisk of [the defendant] and finds nothing.
>
> He turns [the defendant] over to Officer Hunter who has already got the female out of the car. And without making further decisions on whether to place [the defendant] in protective custody, whether to let him walk away, he begins and inventory search. No, nothing about field sobriety tests. And that seems to me, through evidence that his main mission was not to evaluate further for impairment. Nobody talked to [the defendant] about any field sobriety tests.

(Tr. 5:22-23). In making her ruling, the sentencing judge acknowledged that she did not consider the

evidence at the motion to suppress (M.Tr. 2:27). In her written memorandum of decision allowing the defendant's motion to stay, the sentencing judge wrote "[b]ecause it appears to this court that the stop of this defendant and the inventory search of the vehicle were pretextural, the Defendant's Motion for a Stay is **ALLOWED** pending the determination of the appeal" (Add. 86).

Two and a half months after she sentenced the defendant, the sentencing judge filed a "report of correctness of sentence to the Appeals Court pursuant to Mass. R. Crim. P. 34 and G.L. c. 231, § 111," in which she reported the following question:

> Does G.L. c. 94[C], § 32A vest improper discretion in the prosecutor to determine what subsection an individual will be charged under, particularly in light of the statement made to this Court that generally, prosecutors charge individuals under the more stringent subsections of the statute without further explanation or justification; and/or is the statute ambiguous in imposing contradictory mandatory minimum sentences on the same subsequent offense, requiring application of the rule of lenity?

(Add. 88).

The sentencing judge noted that the general practice of Suffolk County is to indict defendants

under §§ 32A(c) & (d) where the substance possessed by a defendant is cocaine and that the instant defendant's record "satisfied only the minimum necessary to qualify as a subsequent offender, though the conduct of which he now stands convicted occurred while he was on probation for his first offense of possession of cocaine with intent to distribute" (Add. 89). The sentencing judge then found that it "appear[ed]" that in this case, a "showing that individual prosecutors have acted arbitrarily or unfairly in exercising their discretion" had been made (Add. 89-90).

The sentencing judge then ruled that the "competing mandatory minimum sentences in subsections (b) and (d) of § 32A" were "facially inconsistent" and, quoting *United States v. Shaw*, 920 F.2d 1225, 1227 (5th Cir. 1991), that "ambiguities should be 'resolved against the imposition of harsher punishment and in favor of lenity.'" For these reasons, the sentencing judge ruled, she was required to sentence the defendant pursuant to G.L. c. 94C, §§ 32A(a) & (b) (Add. 90-92).

SUMMARY OF THE ARGUMENT

I. The sentencing judge improperly sentenced the defendant pursuant to G.L. c. 94C, §§ 32A(a) & (b) as opposed to G.L. c. 94C, §§ 32A(c) & (d). The defendant was charged and convicted of violating G.L. c. 94C, §§ 32A(c) & (d). Pursuant to legislative directive and binding precedent, the judge was required to sentence the defendant as provided in G.L. c. 94C, § 32A(d). When she refused to do so, she erred (pp. 24-41).

II. The sentencing judge improperly stayed the defendant's sentence. Her determination that the defendant had a meritorious claim that his motion to suppress had been improperly denied was based not on the facts as found by the motion judge who heard the motion to suppress, but on facts as found by her based on the evidence at trial. This was error. A sentencing judge deciding a motion to stay a sentence pending appeal cannot substitute her own findings of fact for those made by a judge who took evidence at a hearing on a motion to suppress and made findings of fact (pp. 41-46).

ARGUMENT

I. THE JUDGE ERRONEOUSLY SENTENCED THE DEFENDANT PURSUANT TO §§ 32A (a) & (b) INSTEAD OF §§ 32A(c) & (d).

The sentencing judge erroneously ignored the plain language of G.L. c. 94C, §§ 32A(c) & (d) as well as binding precedent from the Supreme Judicial Court when she determined that she was going to sentence the defendant pursuant to G.L. c. 94C, §§ 32A(a) & (b).[8]

General laws chapter 94C, section 32A provides for different sentences depending on the substance that the defendant is alleged to have possessed and how he is charged under that statute. Section 32A(a) makes it illegal to possess *any* of the forty substances that are listed in class B of G.L. c. 94C, § 31, and makes a violation of that section punishable

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[8] The defendant argued that he should be sentenced pursuant to G.L. c. 94C, §§ 32A(a) & (b) (Tr. 4:66, 69, 71; 5:5-6). Regardless of whether the judge's sentence is treated as a reduction of the crime from a violation of G.L. c. 94C, § 32A(c) & (d) to a violation of G.L. c. 94C, § 32A(a) & (b) pursuant to Mass. R. Crim. P. 25(b)(2), or an outright dismissal of the charges of G.L. c. 94C, §§ 32A(b) & (d), the Commonwealth has a right of appeal of the judge's action to this Court. Mass. R. Crim. P. 25(c)(1); Mass. R. Crim. P. 30(c)(8); *see also* G.L. c. 278, § 28E.

In any event, the judge reported the propriety of the sentence she imposed.

by up to ten years in state prison or up to two and one half years in a house of correction. If a violator of § 32A(a) has been previously convicted of a drug violation, then, pursuant to G.L. c. 94C, § 32A(b), he shall be sentenced to a mandatory minimum term of two, but not more than ten, years in state prison.

Whereas §§ 32A(a) & (b) target the possession of any class B substance generally, G.L. c. 94C, § 32A(c) specifically targets the possession of a few particular class B substances, among them, cocaine. Thus, if a defendant is specifically charged with, and convicted of, violating G.L. c. 94C, § 32A(c) because he possessed cocaine, he is subject to a greater punishment than had been charged generally with possessing a class B substance under § 32A(a): not less than two and one-half nor more than ten years in state prison or not less than one nor more than two and one-half years in a house of correction. And, if a person who is convicted of violating § 32A(c) has previously been convicted of a drug crime, then, pursuant to G.L. c. 94C, § 32A(d), he "shall" be punished by a term of imprisonment in the state prison

for not less than 3 1/2 nor more than fifteen years in state prison. The upshot of this statutory scheme is that, because possession of cocaine falls under both the specific language of § 32A(c) and the general language of § 32A(a), a prosecutor has the discretion to charge a defendant so as to expose him to the harsher penalties of §§ 32A(c) & (d) or the lesser penalties of §§ 32A(a) & (b).

In *Cedeno*, the Supreme Judicial Court considered a due process challenge to § 32A on the grounds that it was void for vagueness. 404 Mass. at 191. More particularly, the defendant in *Cedeno* alleged that that a person could not tell until charged whether he was at risk for the harsher sentence imposed by § 32A(c) (or § 32A(d) if a subsequent offender). *Id.* at 193. He also challenged the discretion given to the prosecutor under the statute as to which section to charge. *Id.* The Court rejected the defendant's claims, stating,

> As we have said, there is no uncertainty about what the Legislature has provided in § 32A. Section 32A(a) proscribes certain conduct which also falls within the conduct and prescribes a range of penalties for its violation. Section 32A(c) proscribes certain conduct which also falls with the

> conduct proscribed by § 32A(a) and prescribes a range of penalties. No one can be confused about what the Legislature intended. If a person possesses cocaine with the intent to distribute it, that conduct is criminal. That point is clear. The Legislature has said it twice in § 32A. It is equally apparent that, if a defendant is convicted under § 32A(a), a particular set of consequences stated in that subsection can follow. Similarly, if a defendant is convicted under § 32A(c), a particular set of consequences stated in that subsection can follow (and a [harsher] sentence will follow]) . . . .
>
> The prosecutor, not the judge, decides whether a person is to be charged under § 32A(a) or under § 32A(c) . . . . The policy choice the Legislature granted to prosecutors in § 32A is not inappropriately wide in range.

Id. at 196-97.[9]

Here, the Commonwealth elected to indict the defendant pursuant to §§ 32A(c) & (d). The caption of the indictment charged "possession of Class B controlled substance with intent to distribute c. 94C, § 32A(c)," and the body of the complaint charged that the defendant "on June 27, 2013, did unlawfully, knowingly and intentionally possess with intent to

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[9] At the time that the Court decided *Cedeno*, a conviction of § 32A(a) could result in a sentence in state prison or a house of correction whereas a conviction of § 32A(c) would result in a minimum mandatory sentence to state prison or a house of correction. *See* 404 Mass. at 190-91 nn. 1 & 2.

distribute a certain controlled substance, to wit: cocaine, a class B controlled substance under the provisions of G.L. c. 94C, § 31." Likewise, the subsequent offender portion of the indictment charged the defendant with possession of a class B controlled substance with the intent to distribute, subsequent offense, in violation of G.L. c. 94C, § 32A(d). Plainly, the defendant was on notice that the Commonwealth had elected to charge him pursuant to G.L. c. 94C, §§ 32A(c) & (d), and thus, expose him to a greater minimum mandatory sentence than had he been charged under G.L. c. 94C, §§ 32A(a) & (b). Once the defendant was convicted of violating §§ 32A(c) & (d), the judge was required to sentence the defendant in accordance with those sections. *See Commonwealth v. Ortiz*, 39 Mass. App. Ct. 70, 73-74, *rev. denied*, 421 Mass. 1103 (1995) (where caption and body of indictment charged the defendant with distributing cocaine in violation of G.L. c. 94C, § 32A(c), defendant was on notice that he was subject to more stringent penalties contained in § 32A(c) and was required to be sentenced as such); *Commonwealth v. Zwickert*, 37 Mass. App. Ct. 364, 366-68 (1994)

(because body of complaint charged the defendant with possession of cocaine with the intent to distribute, defendant was required to be sentenced pursuant to § 32A(c)); *Commonwealth v. Bradley*, 35 Mass. App. Ct. 525, 525-28, *rev. denied*, 416 Mass. 1110 (1994) (1993) (where defendant was charged with a violation of § 32A(c) as a subsequent offender, he was on notice that he was subject to more stringent penalties called for by §§ 32A(c) & (d) and could be sentenced as such); *See also Commonwealth v. Gaskins*, 419 Mass. 809, 813 (1995) (jury has duty to return a verdict on the highest crime which has been proved beyond a reasonable doubt).

Nonetheless, the sentencing judge sentenced the defendant pursuant to §§ 32A(a) & (b). She reached this decision because she believed that there should be some distinguishing feature between §§ 32A(a) and (c); that §§ 32A(b) & (d) were conflicting and thus, ambiguous; that § 32A was void for vagueness because it gave the prosecutor unwarranted discretion to charge possession of cocaine under § 32A(c), and thus, secure a harsher sentence than if charged under § 32A(a); and because she believed that, if the

Supreme Judicial Court revisited the structure of G.L. c. 94C, § 32A, it would overrule *Cedeno* (Tr. 5:10, 14; Add. 87-92). Her ruling is erroneous for several reasons.

At the outset, the judge erred when she ignored a Legislative directive. "[T]he Legislature has great latitude to determine what conduct should be regarded as criminal and to prescribe penalties to vindicate the legitimate interests of society. 'The function of the legislature is primary, its exercises fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety.'" *Commonwealth v. Jackson*, 369 Mass. 904, 909 (1976) (quoting *Weems v. United States*, 217 U.S. 349, 379 (1910)) (internal citations omitted). "Although it is the court's function to impose sentences upon conviction, it is for the Legislature to establish criminal sanctions and, as one of its options, it may prescribe a mandatory minimum term of imprisonment." *Id.* at 922. Where the Legislature has, in the proper occupation of its constitutional duties, enacted a mandatory sentencing scheme for conviction of a crime,

a judge is not free to disregard that statutory directive, for to do so would run afoul of the separation of powers as guaranteed by art. 30 of the Massachusetts Declaration of Rights. *See Commonwealth v. Tim T.*, 437 Mass. 592, 594-95 (2002) (judge not free to put juvenile on pre-trial probation where nothing in statute permitted such a sentence). It was error for the judge do to so in the instant case.

What is more, not only did the judge eschew a legislative directive, she acted in direct contravention to *Cedeno*, which she is bound to follow. The Supreme Judicial Court "is the highest appellate authority in the Commonwealth, and [its] decisions on all questions of law are conclusive on all Massachusetts trial courts." *Commonwealth v. Vasquez*, 456 Mass. 350, 356 (2010). *See Commonwealth v. Anthes*, 71 Mass. 185, 194 (1855) ("Such an adjudication of a court of last resort, made on full deliberation, is held, by the fundamental principles of the common law, binding upon all judges of inferior and subordinate courts . . ."). Simply put, the judge here was required to follow not only the sentencing scheme set in place by the Legislature, but the

Court's decision in *Cedeno* upholding the constitutionality of § 32A and the discretion of the prosecutor to charge a defendant in accordance with that statute. Indeed, a judge is required to follow the decision of the Court even if the judge believes that the binding precedent will be overruled, as the judge stated she did (Tr. 5:10). "Principles of stare decisis require the judge to take [the Court's ruling on an issue of law] "'at face value until formally altered.'" 456 Mass. at 356 (quoting *Sarzen* v. *Gaughan*, 489 Mass. 1076, 1082 (1st Cir. 1973)). *See also Commonwealth v. Dube*, 59 Mass. App. Ct. 476, 485 (2003) (Appeals Court bound to follow rulings of Supreme Judicial Court). And, of course, a judge must follow statutory directives and binding case law regardless of his or her personal opinion. *Commonwealth v. Quispe*, 433 Mass. 508, 513 (2001) (a judge's "personal views regarding the wisdom or propriety of a given law are irrelevant and undermine the principle of separation of powers"); *Jackson*, 369 Mass. at 919 ("It is not our function to inquire as to the 'expediency, wisdom or necessity of the legislative judgment'") (quoting *Slome v. Chief of*

Police of Fitchburg, 304 Mass. 187, 189 (1939)). Because the judge's order ran contrary to a binding decision of the Supreme Judicial Court, it was erroneous.

In addition to ignoring the plain language of both the statute and *Cedeno*, the sentencing judge erred when she ruled that § 32A is ambiguous and that it gives the prosecutor undue discretion in charging a defendant who possesses cocaine.

First, the judge erred in concluding that there was no distinguishing feature between conduct proscribed by § 32A(a) and that proscribed by § 32A(c) (Tr. 5:11). As has been set out *supra* pp. 24-26, § 32A(a) outlaws the possession of any of the forty substances defined by G.L. c. 94C, § 31 as a "class B" controlled substance. A person violates § 32A(c), by contrast, only if he is charged with possessing certain class B controlled substances, such as cocaine. "The purpose of subsection (c) . . . was to single out for more stringent punishment [cocaine, which is] included within the broader prohibition of subsection (a)." *Zwickert*, 37 Mass. App. Ct. at 366. The Legislature could appropriately determine that

certain class B substances, such as cocaine, are so dangerous and are such a scourge to the public that it is necessary to single out possession of those offenses for greater punishment and that a prosecutor should be given the discretion to determine whether to charge a defendant so as to expose him to greater or lesser penalties. *Id.* at 367; *Bradley*, 35 Mass. App. Ct. at 525 n.1 ("Over the years, the Legislature gradually has singled out offenses involving cocaine and other named Class B substances for harsher punishments."); *see also Jackson*, 369 Mass. at 919 ("it is for the Legislature to determine 'that society can best be protected against the evil aimed at by a rigorous application of an inflexible rule'") (quoting *Commonwealth v. Mixer*, 207 Mass. 141, 146 (1910)). As the Court made plain in *Cedeno*, the Legislature intended that the possession of certain specifically defined substances, such as cocaine, be subject to a harsher sentence than possession of a class B substance in general.

The judge's attempt to distinguish *Cedeno* by pointing to the fact that, in that case, the Court only considered whether §§ 32A(a) and (c) created

ambiguity whereas in the instant case, §§ 32A(b) and (d) create conflicting mandatory minimum sentences, and thus, the rule of lenity should apply (Add. 90-92) is unavailing. The Court's statement in *Cedeno*, 404 Mass. at 196, that, "if a defendant is convicted under § 32A(a), a particular set of consequences stated in that subjection can follow. Similarly, if a defendant is convicted under § 32A(c), a particular set of consequences states in that subsection can follow" is as applicable to the distinction between §§ 32A(b) and (d) as it is to the distinction between §§ 32A(a) and (c): if a defendant is convicted of § 32A(b), a particular set of consequences are prescribed, and if a defendant is convicted of § 32A(d), a different set of consequences are prescribed. Because "[n]o one can be confused about what the Legislature intended" *Cedeno*, 404 Mass. at 196, when it enacted § 32A, the rule of lenity does not apply here. *See Wing v. Commissioner of Probation*, 473 Mass. 368, 375 (2015) ("The rule of lenity is simply inapplicable where, as here, the statute contains no ambiguity . . .").

Moreover, because § 32A, in different subsections, sets different punishments for different

crimes, the judge's reliance on *Shaw* in her reporting of the question to this Court is misplaced. In *Shaw*, the defendant was convicted of possessing 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine. 902 F.2d at 1227-28. Due to a "clerical or drafting error," such a conviction was subject to two different mandatory minimum sentence schemes. *Id.* The Fifth Circuit Court of Appeals held that the statute was facially inconsistent, but that the defendant suffered no prejudice as the District Court applied the rule of lenity and sentenced the defendant pursuant to the less harsh mandatory minimum sentence scheme. *Id.* at 1228-29.

By contrast, a conviction for violating §§ 32A(a) & (b) brings with it a mandatory minimum sentence of "not less than 2 nor more than ten years" while a conviction for violating §§ 32A(c) & (d) carries its own mandatory minimum sentence of "not less than 3 1/2 nor more than fifteen years". *See Bradley*, 35 Mass. App. Ct. at 527 (detailing different penalty schemes for convictions of §§ 32A(b) & (d)). Because each respective subsection carries with it a single

mandatory minimum sentence that is unique to that subjection, *Shaw* is inapt, and the judge's conclusion that § 32A contains an ambiguous sentencing scheme is erroneous. *Contra Commonwealth v. Gagnon*, 387 Mass. 567, 568-74 (1982) (striking down drug statute as unconstitutionally vague where statute contained mandatory term of imprisonment, optional penalty of a fine or imprisonment, or both, for a violation).

The judge also erred when she held that § 32A vests a prosecutor with undue discretion in charging a defendant who possessed cocaine. It is bedrock principle the determination of what charges to bring falls within the broad discretion of the prosecutor. *Commonwealth v. King*, 374 Mass. 5, 22 (1977). "This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." *Wayte v. United States*, 470 U.S. 598, 607

(1985). As part of that discretion, the Commonwealth may charge a defendant with "the crime for which the greater punishment may be provided, even though it is the lesser included offense. The Commonwealth retains the authority to make the determination in the first instance of the offense with which a person in the defendant's circumstance should be charged." *Commonwealth v. Jones*, 75 Mass. App. Ct. 903, 906, *rev. denied*, 455 Mass. 1109 (2009). *See also Commonwealth v. Richardson*, 469 Mass. 248, 254-55 (2014) (prosecutor has discretion to charge a defendant under multiple enhancement statutes and retains the discretion to decide which one to apply at sentencing by moving to nolle prosequi all but one charge at sentencing).

In this vein, a prosecutor's decision to charge a defendant who possesses cocaine under §§ 32A(c) & (d) so as to expose him to greater punishment rather than under §§ 32A(a) & (b) is no less an exercise of valid prosecutorial discretion than is a decision to charge a defendant with a more serious offense as opposed to a lesser-included offense. *Zwickert*, 37 Mass. App. Ct. at 367 (analogizing prosecutor's authority to

charge possession of cocaine under § 32A(c) to analogous authority to charge a defendant with an offense, such as armed robbery while masked, or a lesser-included offense, such as unmasked armed robbery or unarmed robbery). Here, in charging the defendant under §§ 32A(c) & (d), the prosecutor, as the executive arm of our government, validly exercised the discretion given to her by the Legislature. The judge's ruling to the contrary was erroneous.

Finally, the judge erroneously concluded that the practice of indicting defendants "for the more serious offenses found in subsections (c) and (d) where cocaine is the relevant controlled substance . . . [without] further reason or justification" meant that the district attorney's office was charging defendants arbitrarily (Add. 89-90). Simply put, it cannot be arbitrary to have a policy to charge persons under §§ 32A(c) & (d) for the very conduct - possession of cocaine - that the Legislature has explicitly singled out and authorized for harsher punishment. Indeed, a plain reading of § 32A suggests that the Legislature intended that a person who possesses cocaine be charged under § 32A(c) as the default, and that the

prosecutor's discretion come into play - if at all - in proceeding on only so much of the indictment as charges possession of a class B substance as set out in § 32A(a). *See Zwickert*, 37 Mass. App. Ct. at 367-68 (prosecutor exercised discretion to proceed only on so much of the complaint as charged possession of a class B substance). Similarly, in deciding how to charge the defendant, the prosecutor's taking into account that the defendant was on federal probation for a similar offense at the time that he committed the instant crime cannot be deemed "arbitrary" (Add. 89), as such a defendant's criminal proclivity is well within the universe of factors a prosecutor may consider in charging a defendant. *See Wayte*, 470 U.S. at 607.

Indeed, in reaching the conclusion that the district attorney's office's policy of charging individuals who possess cocaine under § 32A(c) is arbitrary, the judge applied the wrong standard. To be successful with a claim of selective prosecution, a defendant must show "that a broader class of persons than those prosecuted has violated the law, . . . that failure to prosecute was either consistent or

deliberate, . . . and that the decision not to prosecute was based on impermissible classification such as race, religion, or sex." *Commonwealth v. Franklin*, 376 Mass. 885, 894 (1978) (internal citations omitted). Here, the defendant neither made nor offered such a showing. Thus, the judge's conclusion was erroneous.

For these reasons, the judge's refusal to sentence the defendant as mandated by §§ 32A(c) & (d) was error.

II. THE SENTENCING JUDGE'S STATED BASIS FOR STAYING THE DEFENDANT'S SENTENCE WAS ERRONEOUS.

The judge also erred in granting the defendant's motion to stay his sentence. In moving to stay his sentence pursuant to Mass. R. Crim. P. 31, the defendant bore the burden of demonstrating a likelihood of success on appeal. *See, e.g., Commonwealth v. Hodge*, 380 Mass. 851, 855 (1980).[10]

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[10] In moving to stay a sentence, a defendant must also convince the judge that he presents no risk of flight or danger to the community. *Commonwealth v. Senior*, 429 Mass. 1021, 1022 (1999). Here, as the Commonwealth argued to the judge (Tr. 5:25, 31-32), the defendant failed to meet his burden on this prong as well, as he had committed the instant offenses while on supervised release for charges similar to the instant crime. Although this fact would have been

Thus, he was tasked with raising an issue "'which offers some reasonable possibility of a successful decision in the appeal.'" *Commonwealth v. Allen*, 378 Mass. 489, 498 (1979) (quoting *Commonwealth v. Levin*, 7 Mass. App. Ct. 501, 504, *rev. denied*, 378 Mass. 800 (1979)). This Court will review an order on a motion to stay for an abuse of discretion or error of law. *Hodge*, 380 Mass. at 853.

The defendant's motion centered on his claim that his motion to suppress was improperly denied because the stop of his vehicle and the resulting inventory search were pretextual (Tr. 5:19; C.A. 30-32). The sentencing judge, who was not the motion judge, agreed (Tr. 5:32; Add. 86). Her ruling was erroneous.

The motion judge, not the sentencing judge, was tasked with making findings of fact based on the evidence presented at the motion hearing. Nevertheless, the sentencing judge allowed the defendant's motion on the grounds that the officers' stated basis for stopping and inventorying the car was pretext, effectively ignoring and subverting the

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grounds to deny the defendant's motion to stay, the Commonwealth cannot say that the judge's finding to the contrary amounted to an abuse of discretion.

express determination to the contrary made by the motion judge who heard the evidence on the motion. Indeed, in determining the likelihood of success on appeal, the sentencing judge effectively made findings of fact regarding the stop and inventory of the defendant's vehicle based on evidence that she heard at trial (Tr. 5:22-24; Add. 86).

The sentencing judge, however, was not in a position to make findings regarding the legality of the stop and inventory of the defendant's car, as "[h]aving successfully established the basis for the stop at the evidentiary hearing on the motion to suppress, the Commonwealth was not required to reestablish the basis for the stop at trial." *Commonwealth v. Deramo*, 436 Mass. 40, 43 (2002). Indeed, during argument on the defendant's motion to stay, the prosecutor told the sentencing judge that she (the prosecutor) had not elicited testimony during trial that she had elicited during the motion to suppress hearing, such as the fact that Ms. Courts had admitted to the officers that she and the defendant had been smoking marijuana or additional evidence regarding the expiration date of the rental agreement.

Based on these factors, as well as other evidence that she received at the motion hearing, the motion judge made an express finding that the officers did not stop or inventory the defendant's car under pretext (M.Tr. 2:16). To the contrary, she made specific findings that, given the state of the evidence before her, the officer's decision to have the defendant exit the Charger and to not permit him to continue to drive was "an entirely reasonable decision and well-founded, given the state of the evidence" (M.Tr. 2:9).

The sentencing judge also appeared to credit the defendant's testimony at trial about why he had crossed into the left lane of traffic over the officers' testimony (Tr. 5:22). The defendant, however, did not testify at the hearing on the motion to suppress, and thus, his version of events did not factor into the motion judge's findings. When the sentencing judge made this determination, she ran afoul of the rule that "'in reviewing a judge's ruling on a motion to suppress, an appellate court 'may not rely on the facts as developed at trial' even where the testimony differed materially from that given at trial.'" *Deramo*, 436 Mass. at 43 (quoting

Commonwealth v. Grandison, 433 Mass. 135, 137 (2001)); *see also See Commonwealth v. Love*, 452 Mass. 498, 508 (2008) (combining a suppression hearing with a trial is improper due to, for example, the enormous difficulty in sorting objections and limiting instructions as to issues relevant to trial or motion to suppress, and the "practical impossibility[] of separately considering each piece of evidence only for its appropriate purpose"); *Commonwealth v. Healy*, 452 Mass. 510, 516 (2008) (the procedure of combining the motion to suppress and trial has "the potential to cause confusion or misapplication of the respective rules of evidence governing suppression hearings and trials, and the respective burdens of proof," while also "creat[ing] uncertainty or misunderstanding of the procedures to be followed, [and] giv[ing] the appearance that the challenged evidence has been accepted on the merits."). For this reason too, her decision was error.

In short, the motion judge, as was her duty, made findings of fact based on the evidence that was presented to her. In reviewing the defendant's claim of a meritorious appellate issue, the sentencing judge

was bound to consider the suppression issue based on the facts as found by the motion judge. *Deramo*, 436 Mass. at 43; *Grandison*, 433 Mass. at 137; *Commonwealth v. Garcia*, 34 Mass. App. Ct. 386, 391-92 (1993) (relying on evidence from motion to suppress); *see also Commonwealth v. Catanzaro*, 441 Mass. 46, 50 (2004) (reviewing court must adopt motion judge's findings of fact absent clear error). The sentencing judge's failure to defer to the motion judge's findings of fact and rulings of law was error.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court vacate the stay of the defendant's sentence and order that he be sentenced in conformity with G.L. c. 94C, § 32A(d).

Respectfully submitted
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ADDENDUM

Article Thirty of the Massachusetts Declaration of Rights

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

G.L. c. 90, § 24. Driving while under influence of intoxicating liquor, etc.; second and subsequent offenses; punishment; treatment programs; reckless and unauthorized driving; failure to stop after collision

(1) (a) (1) Whoever, upon any way or in any place to which the public has a right of access, or upon any way or in any place to which members of the public have access as invitees or licensees, operates a motor vehicle with a percentage, by weight, of alcohol in their blood of eight one-hundredths or greater, or while under the influence of intoxicating liquor, or of marijuana, narcotic drugs, depressants or stimulant substances, all as defined in section one of chapter ninety-four C, or the vapors of glue shall be punished by a fine of not less than five hundred nor more than five thousand dollars or by imprisonment for not more than two and one-half years, or both such fine and imprisonment.

There shall be an assessment of $250 against a person who is convicted of, is placed on probation for, or is granted a continuance without a finding for or otherwise pleads guilty to or admits to a finding of sufficient facts of operating a motor vehicle while under the influence of intoxicating liquor, marijuana, narcotic drugs, depressants or stimulant substances under this section; provided, however, that but $187.50 of the amount collected under this assessment shall be deposited monthly by the court with the state treasurer for who shall deposit it into the Head

Injury Treatment Services Trust Fund, and the remaining amount of the assessment shall be credited to the General Fund. The assessment shall not be subject to reduction or waiver by the court for any reason.

There shall be an assessment of $50 against a person who is convicted, placed on probation or granted a continuance without a finding or who otherwise pleads guilty to or admits to a finding of sufficient facts for operating a motor vehicle while under the influence of intoxicating liquor or under the influence of marihuana, narcotic drugs, depressants or stimulant substances, all as defined by section 1 of chapter 94C, pursuant to this section or section 24D or 24E or subsection (a) or (b) of section 24G or section 24L. The assessment shall not be subject to waiver by the court for any reason. If a person against whom a fine is assessed is sentenced to a correctional facility and the assessment has not been paid, the court shall note the assessment on the mittimus. The monies collected pursuant to the fees established by this paragraph shall be transmitted monthly by the courts to the state treasurer who shall then deposit, invest and transfer the monies, from time to time, into the Victims of Drunk Driving Trust Fund established in section 66 of chapter 10. The monies shall then be administered, pursuant to said section 66 of said chapter 10, by the victim and witness assistance board for the purposes set forth in said section 66. Fees paid by an individual into the Victims of Drunk Driving Trust Fund pursuant to this section shall be in addition to, and not in lieu of, any other fee imposed by the court pursuant to this chapter or any other chapter. The administrative office of the trial court shall file a report detailing the amount of funds imposed and collected pursuant to this section to the house and senate committees on ways and means and to the victim and witness assistance board not later than August 15 of each calendar year.

If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program by a

court of the commonwealth or any other jurisdiction because of a like violation preceding the date of the commission of the offense for which he has been convicted, the defendant shall be punished by a fine of not less than six hundred nor more than ten thousand dollars and by imprisonment for not less than sixty days nor more than two and one-half years; provided, however, that the sentence imposed upon such person shall not be reduced to less than thirty days, nor suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until such person has served thirty days of such sentence; provided, further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; to engage in employment pursuant to a work release program; or for the purposes of an aftercare program designed to support the recovery of an offender who has completed an alcohol or controlled substance education, treatment or rehabilitation program operated by the department of correction; and provided, further, that the defendant may serve all or part of such thirty day sentence to the extent such resources are available in a correctional facility specifically designated by the department of correction for the incarceration and rehabilitation of drinking drivers.

If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program by a court of the commonwealth, or any other jurisdiction because of a like offense two times preceding the date of the commission of the offense for which he has been convicted, the defendant shall be punished by a fine of not less than one thousand nor more than fifteen thousand dollars and by imprisonment for not less than

one hundred and eighty days nor more than two and one-half years or by a fine of not less than one thousand nor more than fifteen thousand dollars and by imprisonment in the state prison for not less than two and one-half years nor more than five years; provided, however, that the sentence imposed upon such person shall not be reduced to less than one hundred and fifty days, nor suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until he shall have served one hundred and fifty days of such sentence; provided, further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative, to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; to engage in employment pursuant to a work release program; or for the purposes of an aftercare program designed to support the recovery of an offender who has completed an alcohol or controlled substance education, treatment or rehabilitation program operated by the department of correction; and provided, further, that the defendant may serve all or part of such one hundred and fifty days sentence to the extent such resources are available in a correctional facility specifically designated by the department of correction for the incarceration and rehabilitation of drinking drivers.

If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like offense three times preceding the date of the commission of the offense for which he has been convicted the defendant shall be punished by a fine of not less than one thousand five hundred nor more than twenty-five thousand dollars and by imprisonment for not less than two years nor more than

two and one-half years, or by a fine of not less than one thousand five hundred nor more than twenty-five thousand dollars and by imprisonment in the state prison for not less than two and one-half years nor more than five years; provided, however, that the sentence imposed upon such person shall not be reduced to less than twelve months, nor suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until such person has served twelve months of such sentence; provided, further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; to engage in employment pursuant to a work release program; or for the purposes of an aftercare program designed to support the recovery of an offender who has completed an alcohol or controlled substance education, treatment or rehabilitation program operated by the department of correction; and provided, further, that the defendant may serve all or part of such twelve months sentence to the extent that resources are available in a correctional facility specifically designated by the department of correction for the incarceration and rehabilitation of drinking drivers.

If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like offense four or more times preceding the date of the commission of the offense for which he has been convicted, the defendant shall be punished by a fine of not less than two thousand nor more than fifty thousand dollars and by imprisonment for not less than two and one-half years or by a fine of not less than two thousand nor more than fifty thousand

dollars and by imprisonment in the state prison for not less than two and one-half years nor more than five years; provided, however, that the sentence imposed upon such person shall not be reduced to less than twenty-four months, nor suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until he shall have served twenty-four months of such sentence; provided, further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; to engage in employment pursuant to a work release program; or for the purposes of an aftercare program designed to support the recovery of an offender who has completed an alcohol or controlled substance education, treatment or rehabilitation program operated by the department of correction; and provided, further, that the defendant may serve all or part of such twenty-four months sentence to the extent that resources are available in a correctional facility specifically designated by the department of correction for the incarceration and rehabilitation of drinking drivers.

A prosecution commenced under the provisions of this subparagraph shall not be placed on file or continued without a finding except for dispositions under section twenty-four D. No trial shall be commenced on a complaint alleging a violation of this subparagraph, nor shall any plea be accepted on such complaint, nor shall the prosecution on such complaint be transferred to another division of the district court or to a jury-of-six session, until the court receives a report from the commissioner of probation pertaining to the defendant's record, if any, of prior convictions of such violations or of assignment to an alcohol or controlled substance education, treatment,

or rehabilitation program because of a like offense; provided, however, that the provisions of this paragraph shall not justify the postponement of any such trial or of the acceptance of any such plea for more than five working days after the date of the defendant's arraignment. The commissioner of probation shall give priority to requests for such records.

At any time before the commencement of a trial or acceptance of a plea on a complaint alleging a violation of this subparagraph, the prosecutor may apply for the issuance of a new complaint pursuant to section thirty-five A of chapter two hundred and eighteen alleging a violation of this subparagraph and one or more prior like violations. If such application is made, upon motion of the prosecutor, the court shall stay further proceedings on the original complaint pending the determination of the application for the new complaint. If a new complaint is issued, the court shall dismiss the original complaint and order that further proceedings on the new complaint be postponed until the defendant has had sufficient time to prepare a defense.

If a defendant waives right to a jury trial pursuant to section twenty-six A of chapter two hundred and eighteen on a complaint under this subdivision he shall be deemed to have waived his right to a jury trial on all elements of said complaint.

* * * *

G.L. c. 94C, § 31. Classes of controlled substances; establishment of criminal penalties for violations of this chapter

* * * *

CLASS B

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently

by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate

(2) Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in paragraph (1) except that these substances shall not include the isoquinoline alkaloids of opium

(3) Opium poppy and poppy straw

(4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

(5) Phenyl-2-Propanone (P2P)

(6) Phenylcyclohexylamine (PCH)

(7) Piperidinocyclohexanecarbonitrile (PCC)

(8) 3,4-methylenedioxy methamphetamine (MDMA).

(b) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including isomers, esters, ethers, salts, and salts of isomer, esters, and ethers, whenever the existence of such isomers, esters, ethers and salts is possible within the specific chemical designation:

(1) Alphaprodine

(2) Anileridine

(3) Bezitramide

(4) Dihydrocodeine

(5) Diphenoxylate

(6) Fentanyl

(7) Isomethadone

(8) Levomethorphan

(9) Levorphanol

(10) Metazocine

(11) Methadone

(12) Methadone-Intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane

(13) Moramide-Intermediate, 2-methyl-3 morpholine-1, 1-diphenyl-propane carboxylic acid

(14) Pethidine

(15) Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine

(16) Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate

(17) Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid

(18) Phenazocine

(19) Piminodine

(20) Racemethorphan

(21) Racemorphan

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers and salts of its optical isomers.

(2) Any substance which contains any quantity of methamphetamine, including its salts, isomers and salts of isomers.

(3) Phenmetrazine and its salts.

(4) Methylphenidate.

(d) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system:

(1) Any substance which contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid.

(2) Any substance which contains any quantity of methaqualone, or any salt or derivative of methaqualone.

(e) Unless specifically excepted or listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Lysergic acid

(2) Lysergic acid amide

(3) Lysergic acid diethylamide

(4) Phencyclidine.

* * * *

G.L. c. 94C, § 32A. Class B controlled substances; unlawful manufacture, distribution, dispensing or possession with intent to manufacture, etc.; eligibility for parole

(a) Any person who knowingly or intentionally manufactures, distributes, dispenses, or possesses with intent to manufacture, distribute or dispense a controlled substance in Class B of section thirty-one shall be punished by imprisonment in the state prison for not more than ten years, or in a jail or house of correction for not more than two and one-half years, or by a fine of not less than one thousand nor more than ten thousand dollars, or both such fine and imprisonment.

(b) Any person convicted of violating this section after one or more prior convictions of manufacturing, distributing, dispensing, or possessing with the intent to manufacture, distribute or dispense a controlled substance as defined by section thirty-one of this chapter under this or any other prior law of this jurisdiction or of any offense of any other jurisdiction, federal, state, or territorial, which is the same as or necessarily includes the elements of said offense shall be punished by a term of imprisonment in the state prison for not less than 2 nor more than ten years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of 2 years and a fine of not less than two thousand and five hundred nor more than twenty-five thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(c) Any person who knowingly or intentionally manufactures, distributes, dispenses or possesses with intent to manufacture, distribute or dispense phencyclidine or a controlled substance defined in clause (4) of paragraph (a) or in clause (2) of paragraph (c) of class B of section thirty-one shall be punished by a term of imprisonment in the state prison for not less than two and one-half nor more than ten years or by imprisonment in a jail or house of correction for not less than one nor more than two

and one-half years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of one year and a fine of not less than one thousand nor more than ten thousand dollars may be imposed but not in lieu of the mandatory minimum one year term of imprisonment, as established herein.

(d) Any person convicted of violating the provisions of subsection (c) after one or more prior convictions of manufacturing, distributing, dispensing or possessing with the intent to manufacture, distribute, or dispense a controlled substance, as defined in section thirty-one or of any offense of any other jurisdiction, either federal, state or territorial, which is the same as or necessarily includes, the elements of said offense, shall be punished by a term of imprisonment in the state prison for not less than 31/2 nor more than fifteen years and a fine of not less than two thousand five hundred nor more than twenty-five thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(e) Any person serving a mandatory minimum sentence for violating this section shall be eligible for parole after serving one-half of the maximum term of the sentence if the sentence is to the house of correction, provided that said person shall not be eligible for parole upon a finding of any one of the following aggravating circumstances:

> (i) the defendant used violence or threats of violence or possessed a firearm, rifle, shotgun, machine gun or a weapon described in paragraph (b) of section 10 of chapter 269, or induced another participant to do so, during the commission of the offense;
>
> (ii) the defendant engaged in a course of conduct whereby he directed the activities of another who committed any felony in violation of chapter 94C; or

(iii) the offense was committed during the commission or attempted commission of a violation of section 32F or section 32K of chapter 94C.

A condition of such parole may be enhanced supervision; provided, however, that such enhanced supervision may, at the discretion of the parole board, include, but shall not be limited to, the wearing of a global positioning satellite tracking device or any comparable device, which shall be administered by the board at all times for the length of the parole.

G.L. c. 268, § 32B. Resisting arrest

(a) A person commits the crime of resisting arrest if he knowingly prevents or attempts to prevent a police officer, acting under color of his official authority, from effecting an arrest of the actor or another, by:

(1) using or threatening to use physical force or violence against the police officer or another; or

(2) using any other means which creates a substantial risk of causing bodily injury to such police officer or another.

(b) It shall not be a defense to a prosecution under this section that the police officer was attempting to make an arrest which was unlawful, if he was acting under color of his official authority, and in attempting to make the arrest he was not resorting to unreasonable or excessive force giving rise to the right of self-defense. A police officer acts under the color of his official authority when, in the regular course of assigned duties, he is called upon to make, and does make, a judgment in good faith based upon surrounding facts and circumstances that an arrest should be made by him.

(c) The term ''police officer'' as used in this section shall mean a police officer in uniform or, if out of uniform, one who has identified himself by

exhibiting his credentials as such police officer while attempting such arrest.

(d) Whoever violates this section shall be punished by imprisonment in a jail or house of correction for not more than two and one-half years or a fine of not more than five hundred dollars, or both.

G.L. c. 278, § 28E. Appeals by commonwealth

An appeal may be taken by and on behalf of the commonwealth by the attorney general or a district attorney from the district court to the appeals court in all criminal cases and in all delinquency cases from a decision, order or judgment of the court (1) allowing a motion to dismiss an indictment or complaint, (2) allowing a motion to suppress evidence, or (3) denying a motion to transfer pursuant to section sixty-one of chapter one hundred and nineteen.

An appeal may be taken by and on behalf of the commonwealth by the attorney general or a district attorney from the superior court to the supreme judicial court in all criminal cases from a decision, order or judgment of the court (1) allowing a motion to dismiss an indictment or complaint, or (2) allowing a motion for appropriate relief under the Massachusetts Rules of Criminal Procedure.

An application for an appeal from a decision, order or judgment of the superior court determining a motion to suppress evidence prior to trial may be filed in the supreme judicial court by a defendant or by and on behalf of the commonwealth by the attorney general or a district attorney. If such application is denied, or if such application is granted but the interlocutory appeal is heard by a single justice, the determination of the motion to suppress evidence shall be open to review by the full court after trial in the same manner and to the same extent as determinations of such motions not appealed under the interlocutory procedure herein authorized.

Rules of practice and procedure with respect to appeals authorized by this section shall be the same

as those applicable to criminal appeals under the Massachusetts Rules of Appellate Procedure.

Mass. R. Crim. P. 25: Motion Required for Finding of Not Guilty

* * * *

(b) Jury Trials.

* * * *

(2) Motion After Discharge of Jury. If the motion is denied and the case is submitted to the jury, the motion may be renewed within five days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned, the judge may on motion set aside the verdict and order a new trial, or order the entry of a finding of not guilty, or order the entry of a finding of guilty of any offense included in the offense charged in the indictment or complaint.

* * * *

(c) Appeal.

(1) Right of Appeal Where Motion for Relief Under Subdivision (b) Is Allowed After a Jury Verdict of Guilty. The Commonwealth shall have the right to appeal to the appropriate appellate court a decision of a judge granting relief under the provisions of subdivisions (b)(1) and (2) of this rule on a motion for required finding of not guilty after the jury has returned a verdict of guilty or on an order for the entry of a finding of guilt of any offense included in the offense charged in the indictment or complaint.

* * * *

Mass. R. Crim. P. 30: Postconviction Relief

* * * *

(c) Post Conviction Procedure.

* * * *

(8) Appeal. An appeal from a final order under this rule may be taken to the Appeals Court, or to the Supreme Judicial Court in an appropriate case, by either party.

(A) If an appeal is taken, the defendant shall not be discharged from custody pending final decision upon the appeal; provided, however, that the defendant may, in the discretion of the judge, be admitted to bail pending decision of the appeal.

(B) If an appeal or application therefor is taken by the Commonwealth, upon written motion supported by affidavit, the Appeals Court or the Supreme Judicial Court may determine and approve payment to the defendant of the costs of appeal together with reasonable attorney's fees, if any, to be paid on the order of the trial court after entry of the rescript or the denial of the application. If the final order grants relief other than a discharge from custody, the trial court or the court in which the appeal is pending may, upon application by the Commonwealth, in its discretion, and upon such conditions as it deems just, stay the execution of the order pending final determination of the matter.

* * * *

Mass. R. Crim. P. 31: Stay of Execution; Relief Pending Review Automatic Expiration of Stay

(a) Imprisonment. If a sentence of imprisonment is imposed upon conviction of a crime, the entry of an appeal shall not stay the execution of the sentence unless the judge imposing it or, pursuant to Mass. R. App. P. 6, a single justice of the court that will hear the appeal, determines in the exercise of discretion that execution of said sentence shall be stayed pending the determination of the appeal. If execution of a sentence of imprisonment is stayed, the judge or justice may at that time make an order relative to the custody of the defendant or for admitting the defendant to bail.

(b) If the application for a stay of execution of sentence is allowed, the order allowing the stay may state the grounds upon which the stay may be revoked and, in any event, shall state that upon release by the appellate court of the rescript affirming the conviction, stay of execution automatically expires unless extended by the appellate court. Any defendant so released shall provide prompt written notice to the clerk of the trial court regarding the defendant's current address and promptly notify the clerk in writing of any change thereof. The clerk shall notify the appellate court that will hear the appeal that a stay of execution of sentence has been allowed. At any time after the stay expires, the Commonwealth may move in the trial court to execute the sentence. The court shall schedule a prompt hearing and issue notice thereof to the defendant unless the prosecutor requests, for good cause shown, that a warrant shall issue.

(c) Fine. If a reservation, filing, or entry of an appeal is made following a sentence to pay a fine or fine and costs, the sentence shall be stayed by the judge imposing it or by a single justice of the court that will hear the appeal if there is a diligent perfection of appeal.

(d) Probation or Suspended Sentence. An order placing a defendant on probation or suspending a sentence may be stayed if an appeal is taken.

Mass. R. Crim. P. 34: Report

If, prior to trial, or, with the consent of the defendant, after conviction of the defendant, a question of law arises which the trial judge determines is so important or doubtful as to require the decision of the Appeals Court, the judge may report the case so far as necessary to present the question of law arising therein. If the case is reported prior to trial, the case shall be continued for trial to await the decision of the Appeals Court.

10

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT

Suffolk, ss.

Criminal Action
Docket No. 2014-10019

COMMONWEALTH
v.
MOSES EHIABHI

MOTION TO SUPPRESS EVIDENCE

Now comes the Defendant, Moses Ehiabhi, and respectfully moves that the Court suppress all evidence seized by the Boston Police on June 27, 2013 as a result of an unlawful pursuit and detention of the Defendant, including certain alleged quantities of crack cocaine. The Defendant further moves to suppress all evidence seized during a search of the Defendant's rented automobile. As grounds therefor, Defendant states that the detention and search of the Defendant and his vehicle were conducted without a warrant and in the absence of legal justification.

Introduction of this evidence would violate the Defendant's rights under the Fourth, Fifth and Fourteenth Amendments of the United States Constitution, Articles XII and XIV of the Massachusetts Declaration of Rights, and G.L. c. 276, Sec. 1 et seq. WHEREFORE, the Defendant respectfully moves that the Court suppress all evidence seized by the Boston Police on June 27, 2013.

FILED

AUG 28 2014

Volume: I
Pages: 1-20
Exhibits: 0

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, S.S. SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

* * * * * * * * * * * * * * * * * * * *

COMMONWEALTH OF MASSACHUSETTS

v. Docket No. SUCR2014-10019

MOSES EHIABHI, ET AL

* * * * * * * * * * * * * * * * * * * *

MOTION TO SUPPRESS HEARING
BEFORE THE HONORABLE MARY K. AMES

APPEARANCES:

For the Commonwealth:
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Boston, Massachusetts
Room 713
November 5, 2014

Proceedings recorded by Court Personnel.
Transcript produced by Approved Court Transcriber
Marguerite Leverenz.

I N D E X

(Court called to order.)
(Defendant present.)
(10:26 a.m.)

THE CLERK: This is the matter of Commonwealth versus Moses Ehiabhi, case number 2014-10019. The matter is brought forward for the entry of the judge's findings regarding the motion to suppress, your Honor.

THE COURT: Thank you, Mr. Clerk.

This case came before the Court on November 4, 2014, for hearing on the Defendant's motion to suppress evidence, on docket number 2014-10019, Commonwealth v. Moses Ehiabhi, E-h-i-a-b-h-i.

The dictation of my decision -- the dictation that I'm about to put on the record shall be the rulings and findings -- the Court's rulings and findings in this case. And I order that a transcript shall be produced, which will be my written decision. Further order a copy of my transcript to be placed into the file and to be distributed to counsel in this matter.

In this case -- can you stop for just a minute?

THE CLERK: Yes.

THE COURT: I don't have the list. Can you print yes --

(Court recessed at 10:28 a.m.)

(Court reconvened at 10:30 a.m.)

THE COURT: Thank you.

In this matter, the Defendant is charged in a series of indictments with Count I, distribution of cocaine, subsequent

offense; Count II, operating under the influence of drugs; Count III, assault and battery on a police officer; and Count IV, resisting arrest.

The charges arise from a series of events alleged to have occurred on June 27, 2013, at approximately two o'clock in the morning in the vicinity of Norfolk Street in the Dorchester neighborhood of the city of Boston.

One witness was presented on behalf of the Commonwealth, Officer Steven Dodd of the Boston Police Department. The defense called one witness as well, Moses Ehiabhi, Senior, the father of the Defendant.

There were 17 exhibits admitted before the Court. Exhibit 1, a photograph of the automobile, specifically the interior console.

Exhibit 2, the booking photograph of the Defendant.

Exhibit 3, the inventory policy of the Boston Police Department.

Exhibit 4, a photograph depicting a sandwich bag box.

Exhibit 5, a photograph of a thumbtack.

Exhibit 6, a close-up of a photograph of the -- the same thumbtack depicting crack cocaine residue.

Exhibit 7, photographs of an area depicting a playground and a field.

Exhibit 8, a photograph of clear plastic bags alleged to have been discarded by the Defendant.

Exhibit 9, a further photograph of clear plastic bags.

Exhibit 10, photographs of the bags alleged to have contained crack cocaine.

Exhibit 11, a photograph of bags alleged to contain crack cocaine.

Exhibit 12, a photograph of a bag with keys alleged -- the bag alleged to have contained crack cocaine.

Exhibit 13, photograph depicting the keys allegedly thrown by the Defendant.

Exhibit 14, a further photograph of bags alleged to contain crack cocaine and keys.

Exhibit 15, the motor vehicle citation issued to the Defendant.

Exhibit 16, a further close-up booking photograph of the Defendant.

And Exhibit 17, the purported rental agreement for the automobile in question.

The case came before the Court on the Defendant's motion to suppress evidence. Specifically, the Defendant moves to suppress all evidence seized during a search conducted of the Defendant's rented automobile, as well as crack cocaine allegedly recovered during the Defendant's flight, and crack cocaine recovered from the mouth of the Defendant.

The Defendant further moves to suppress, and urges the Court to find that the stop of the Defendant by police officers

on June 27, 2013, was not lawful.

The Court concludes that the Commonwealth has met its burden in demonstrating the lawfulness of the stop, the lawfulness of the search, pursuant to the inventory policy of the Boston Police Department, and the lawfulness of the seizure of the evidence recovered. And as such, the Defendant's motion is denied.

I make the following findings of fact. On or about June 27th, 2013, at two o'clock in the morning, Police Officer Steven, S-t-e-v-e-n, Dodd, a nine-and-a-half-year veteran of the Boston Police Department, was in the vicinity of Norfolk Street, traveling in plain clothes in an unmarked cruiser with his partner, Police Officer Hunter.

Although Officer Dodd was in plain clothes and the cruiser was unmarked, he had affixed around his neck a Boston Police badge visible to anyone who would be making observations of the officer.

And although the cruiser was unmarked, there were visible blue lights in the grill and in the visor. These lights would be visible, whether illuminated or not, because of the prominence of the light on the motor vehicle.

Officer Dodd has previous experience, both in his current assignment to the drug control unit, as well as the approximately eight to nine years spent in B-2 as a patrol officer.

The Court credits the testimony of Officer Dodd in its entirety, and particularly credits the experience that he obtained while a patrol officer in B-2. And the Court finds that Norfolk Avenue, in the Roxbury section city of Boston, is within the geographic area that is part of area B-2.

The officer testified to, and the Court credits, that that area of Norfolk Avenue is a high-crime area, that there is an excess of violence, violent crime, crime involving firearms, crime involving drugs, and theft of property including theft of motor vehicles.

As Officer Dodd and Officer Hunter were traveling on Norfolk Avenue at approximately the Burrell Street intersection, just before the Burrell Street intersection, Officer Dodd made observations of a Dodge Charger that came onto Norfolk Street from a side street and veered into the opposite lane slightly at first, and then fully began traveling in the opposite travel lane, therefore, traveling in the wrong direction on Norfolk Street.

After making these initial observations, Officer Dodd determined that he would initiate a stop of the motor vehicle. This was after observing the motor vehicle come close to colliding with a light pole near the intersection of Norfolk Avenue and Shirley Street.

Having made observations of the erratic operation of the motor vehicle, Officer Dodd activated his lights and pulled the

motor vehicle over.

The motor vehicle pulled over to the left; again, driving on the wrong side of the street, and pulled over on the wrong -- in the wrong travel lane at the intersection of Norfolk Street and Langdon Road -- L-a-n-g-d-o-n, Road.

When the officer approached the motor vehicle, he immediately made observations of the operator, and noted the operator's eyes to be red and glassy. He smelled the odor of burnt marijuana coming from the interior of the motor vehicle.

In having initial conversation with the operator, he noted that the operator's speech was slurred.

The operator of the motor vehicle was identified as this Defendant, Moses Ehiabhi. He also made observations of a woman, later identified as Katelyn (phonetic) Courts, C-o-u-r-t-s, in the passenger seat.

He requested the Defendant produce a license of registration -- and registration. The Defendant produced his license, and also produced a rental agreement, which had a return date noted of June 11, 2013, making the motor vehicle overdue for return.

He made further observations of the female passenger, Ms. Courts, was not wearing her seat belt, and that she also displayed obvious signs of intoxication.

Officer Dodd asked whether or not anyone was smoking marijuana. And Ms. Courts immediately replied that, yes, we

were smoking before leaving Borough (phonetic) Street.

She was then asked to produce identification or a license. She was unable to produce a driver's license but did produce a Massachusetts identification card. She was cited for failure to wear a seat belt, as required by the law.

During this time, the officer made observations in plain view, of the motor vehicle, from his location at the driver's-side door, on the front center console, of a Pepsi bottle that had a rolled up sandwich bag. This is depicted in Exhibit 1.

As he continued his preliminary investigation of the matter, Officer Dodd formed the opinion that Mr. Ehiabhi was operating under the influence of marijuana, and that his operation was impaired as a result of the ingestion of the drug.

At that time, he requested Mr. Ehiabhi step out from the vehicle. He did so, and the Court credits, specifically, this testimony, he did so in order to determine -- further determine the intoxication level of the Defendant.

At this time, he had made a decision that he would not permit the driver to continue to operate the motor vehicle. He determined that to do so, would have placed the public at danger.

The Court credits this decision of the officer, and finds that it is an entirely reasonable decision and well founded, given the state of the evidence.

He had not yet made a decision to arrest. The Court infers

that at this time and based upon the evidence of Officer Dodd, who indicated that he might have permitted the operator simply to call someone to take him home, that he may have been considering not arresting the Defendant for operating under the influence of drugs.

However, the Court finds that there was ample, probable cause at that time to support such an arrest.

The officer made a decision in his discretion, and the Court finds that that decision was entirely reasonable and supported by the evidence at that time to tow the automobile.

At that time, the tow became necessary, first, because the officer had determined that the Defendant, who was operating, was impaired.

Second, the passenger of the motor vehicle was not able to operate, being unlicensed, and also, in the officer's opinion, being impaired.

Third, there was some question about the lawful authority of the Defendant to operate the motor vehicle at that time.

And fourth, given the location of the stop and these events, the officer, in his experience, knowing that this was a high-crime area, and having familiarity with property crimes, including larceny motor vehicle, the officer concluded, and this Court agrees, that the proper course of action was to tow the motor vehicle for safekeeping purposes.

The officer made observations of the Defendant as he

stepped out of the car. He observed first and foremost that the Defendant was a large man, approximately 6'5", weighing 300 pounds.

He also made observations that as the Defendant stepped out of the car, he purposefully turned away from the officer. This heightened the officer's concerns for safety, given the hour, the location, and the Defendant's actions.

He made further observations that the Defendant began to look around him in an uneasy fashion. He asked the Defendant to turn towards him. The officer's concerns for safety grew with the Defendant's uneasy appearance and the motions he was making.

At this time, the Defendant -- the officer made the decision to pat-frisk the Defendant for his safety and the safety of his partner, as well as the general public.

The Court finds that the decision to pat-frisk under these circumstances was entirely reasonable.

As he attempted to pat-frisk the Defendant, he also asked the Defendant to step to the rear of the car and indicated that he would begin an inventory search pursuant to -- and the Court finds that search was conducted pursuant to the inventory policy of the Boston Police Department, submitted by the Commonwealth and marked as Exhibit 3.

As he informed the Defendant that he was going to begin the inventory search preparatory to a tow, he first made observations -- the officer first made observations of the

passenger's purse, which was wide open. The officer made observations of a glass pipe, which is in -- which in his experience, he knew to be used in the smoking of marijuana.

He also made observations of a box of Glad sandwich bags, which in his experience, he knew to be used for street-level drug sales.

As he continued the inventory search, he also made observations in the Glad-bag box of a thumbtack. In his experience, he knew that the thumbtack was used to break off pieces of crack cocaine, and in fact, is observed what he believed to be residue of cocaine on the metal portion of the thumbtack.

The -- Officer Dodd overheard Officer Hunter, who was then stationed with the Defendant, ask the Defendant about bumps that were obvious in his front shirt pocket of his black shirt. The shirt pocket is clearly depicted in Exhibit 2; it appears to be a black, silky material.

Officer Hunter asked about bumps in the shirt pocket, at which time the Defendant immediately shoved Officer Hunter and ran from the scene. Both officers pursued the Defendant shouting the lawful command to stop.

The Defendant was observed to cross Norfolk Street and approached a field, depicted in photograph -- admitted as Exhibit 7.

As he approached the field, the Defendant was observed to

reach into his pocket, throwing items on the ground. The items were later recovered in the area where there Defendant had thrown them and were seized by the police officers.

The items recovered were small bags, individually bagged crack cocaine, tied in a distinctive fashion with a top knot contained in sandwich bags.

In the officer's experience, the packaging of crack cocaine in this fashion is consistent with the sale of street-level drugs.

The officers reached the Defendant -- were able to catch up with him in the field and put him to the ground.

As they were trying to cuff him, the Defendant continued to push off Officer Hunter. The Defendant continued to keep one hand underneath him, which led to great difficulty in the officers' attempt to handcuff the Defendant.

In spite of multiple orders to comply, the Defendant failed to do so. The officer then struck the Defendant in the area of the nose and was then able to cuff him.

During the violent struggle, in which the Defendant was pushing off the officers and continued in his efforts to escape apprehension, the Defendant spit out of his mouth a bag containing a crack cocaine rock.

This bag was similarly packaged -- packaged similarly to the other bags that had been recovered from the field, having been discarded from the Defendant during his flight. They were

contained -- it was contained in a plastic bag with the same type of taut (sic) knot.

The officers arrested the Defendant at that point in time, charging him with the various offenses, including operating under the influence of drugs.

They then retraced their steps on the path of flight of the Defendant and recovered 17 bags of crack cocaine in the field and sidewalk, and also, recovered the bag of crack cocaine that the Defendant had spit out of his mouth.

The bags of crack cocaine, as well as car keys, were found at the same location where Officer Dodd saw the Defendant throwing those items. All of the evidence was recovered and submitted to the lab for analysis.

After the arrest of the Defendant, a search incident to arrest, $265 was recovered from the Defendant. The officers finished the inventory search of the Dodge, issued motor vehicle citations to the Defendant, and the Defendant was booked and processed in the usual manner where photographs were taken.

Those photographs are, specifically, Exhibit 2, the booking photograph, and Exhibit 16, a close-up photograph.

Exhibit 16 corroborates the observations of the officer in terms of the Defendant's appearance: Glassy eyes and intoxicated appearance.

The Defendant called Moses Ehiabhi, Senior, the father of the Defendant. He testified that, and the Court credited this

testimony, that he had rented an automobile at Logan Airport on behalf of his son so that his son would be able to assist his girlfriend in moving to Maine. The car was rented on June 4, for a one-week period.

The Defendant told his father, although the father had no personal knowledge of this, the Defendant told his father, when the father inquired why the car had not been returned in a timely fashion, that he had extended the rental period to June 28th. This was alleged to have been done simply on a phone call, and there was no paperwork that was provided to the Defendant by the rental company, according to the Defendant's conversation with his dad.

So the Court finds that the officers' observations of the paperwork in the car are supported by the testimony of Mr. Ehiabhi, that the rental agreement on June 4th would have ended seven days later. And Mr. Ehiabhi was clear in his testimony that there was no other paperwork issued.

The Court does not credit the testimony insofar as the telephone call allegedly made by the son.

The Court has no evidence that would support the hearsay statements of the son that an extension was granted on the telephone without the rental company requiring an additional contract to be entered into, or paperwork, such that the Defendant would be shown to be in legitimate possession.

When the Court inquired as to the evidentiary significance,

the Defense proffered that they sought to introduce this evidence simply as impeachment evidence for the officer's testimony.

The Court finds that to the contrary, the testimony of Mr. Ehiabhi supports the testimony of Officer Dodd, and that the question that the officer had in his mind about whether or not the car was due back prior to June 27th, was reasonable in light of all of the circumstances.

The Defense argues that the search in this case was pretextural in nature. The Court specifically rejects that argument.

The Court finds that the officers were making the observations of the erratic operation of the motor vehicle operating on the wrong side of Norfolk Street, a busy street in the Roxbury section of the city, at 2 a.m. had a reasonable suspicion to pull over and further investigate the matter.

The Court further finds that upon making the observations of the odor of marijuana, as well as the physical condition of the Defendant, including glassy eyes, watery eyes, slurred speech, in conjunction with the erratic operation, that the officers had probable cause to arrest the Defendant for operating under the influence of drugs.

The Court further finds that the decision to tow the car, pursuant to the inventory policy of the Boston Police Department, was proper.

The Court finds that the police officer probably used his discretion, given the totality of the circumstances in this matter, and that pursuant to paragraph 2 of the motor vehicle inventory search policy, Exhibit 3, submitted before the Court, that the officer conducted the search properly to protect the owner's property, to prevent false claims, and to protect the public from consequences that could arise in the event that the car was stolen.

The Court further finds that the officers properly followed paragraph 4 of the motor vehicle inventory search policy in towing the car for safekeeping.

Of course, a legitimate, non-pretext inventory search is not made unlawful simply because the investigating officer remains vigilant for evidence.

In making the threshold determination of the lawfulness of the inventory search, this Court finds that the inventory -- that the impoundment was properly done, and that the inventory search was a proper result of the impoundment decision.

The impoundment of the vehicle -- and the Court finds that it was impounded for non-investigatory reasons, is justified because it is supported by public safety concerns and by concerns of the danger of theft or vandalism to a vehicle left unattended, particularly in this circumstance, given the nature of the area where it would be unattended.

The Court finds that the officers had no alternative where

the driver had been arrested for erratic operation, and where the passenger's license had been suspended.

Even in the event that officers -- and the Court does find that the officer had probable cause to arrest -- even if it was in the officer's mind that they were unclear on whether they would arrest at that time, the Court finds that the officers still had no alternative due to the obvious impairment of the driver.

The Court further finds that the seizure of the pipe and the Pepsi bottle, that those were items that were in plain view in a location observed while the officer was in a location where he was properly stationed.

And further, that the seizure of the multiple packages of crack cocaine and the automobile keys were lawfully done, as they had been objects discarded by the Defendant, and thus, discarded and abandoned by him.

The Court finally concludes that the seizure of the money, $265, from the person of the Defendant, was proper as a search incident to arrest.

Therefore, the Court concludes that the search of the motor vehicle was a lawful motor vehicle inventory search; that it was properly conducted and within the scope of the Boston Police Motor Vehicle Inventory Search Policy; that the recovery and seizure of the various 18 bags of crack cocaine were properly seized, as they were abandoned by the Defendant; and the

Defendant had no legitimate expectation of privacy after discarding and abandoning the property; and that the United States currency recovered from the Defendant was seized during a search incident to a lawful arrest.

And therefore, for all of the foregoing reasons, the Defendant's motion to suppress is denied.

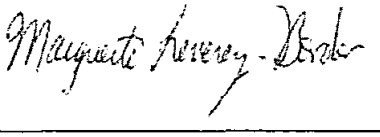
(Hearing adjourned at 11:02 a.m. to resume November 22, 2014.)

C E R T I F I C A T I O N

I, MARGUERITE LEVERENZ, AN APPROVED COURT TRANSCRIBER, DO HEREBY CERTIFY THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT FROM THE RECORD OF THE COURT PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

I, MARGUERITE LEVERENZ, FURTHER CERTIFY THAT THE FOREGOING IS IN COMPLIANCE WITH THE ADMINISTRATIVE OFFICE OF THE TRIAL COURT DIRECTIVE ON TRANSCRIPT FORMAT.

I, MARGUERITE LEVERENZ, FURTHER CERTIFY THAT I NEITHER AM COUNSEL FOR, RELATED TO, NOR EMPLOYED BY ANY OF THE PARTIES TO THE ACTION IN WHICH THIS HEARING WAS TAKEN, AND FURTHER THAT I AM NOT FINANCIALLY NOR OTHERWISE INTERESTED IN THE OUTCOME OF THE ACTION.



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12/04

COMMONWEALTH OF MASSACHUSETTS

37

SUFFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
No. 2014-10019

COMMONWEALTH

vs.

MOSES EHIABHI

MEMORANDUM OF DECISION AND ORDER
ON DEFENDANT'S MOTION FOR STAY OF SENTENCE

The sentence imposed is stayed pursuant to Mass. R. Civ. P. 31 pending the determination of the appeal. Given the uncontroverted testimony at trial, the police stopped the vehicle defendant was driving after he "slightly crossed" the line in the middle of the street. The officers did not follow the vehicle to see if there were any other violations. On approaching the defendant, the police observed defendant's eyes to be glassy and that his speech was slurred. He was asked to produce his license and registration; he easily produced his license and a car rental agreement without any problem. An officer ordered him to exit "to get a better idea of his level of impairment." Once defendant exited, he was pat frisked; nothing was found. The officer then immediately began an inventory search of the car; no officer ever asked defendant to perform any field sobriety tests. The female passenger was also asked to exit; her purse inside the car was then searched also. Even when the inventory search began, the officer had not decided whether to arrest this defendant. Because it appears to this court that the stop of this defendant and the inventory search of the vehicle were pretextural, the Defendant's Motion for a Stay is **ALLOWED** pending the determination of the appeal.

Elizabeth M. Fahey
Justice of the Superior Court

Date:

(40)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. SUCR14-10019

COMMONWEALTH

vs.

MOSES EHIABHI

REPORT OF CORRECTNESS OF SENTENCE TO THE APPEALS COURT PURSUANT TO MASS. R. CRIM. P. 34 AND G. L. C. 231, § 111

On December 17, 2014, a jury convicted the defendant, Moses Ehiabhi, of Possession with Intent to Distribute a Class B Substance under of G. L. c. 94C, § 32A(c), to wit: cocaine, and Assault and Battery on a Police Officer under G. L. c. 265 § 13D. Following a second trial with the same jury, the defendant was also convicted of Possession with Intent to Distribute a Class B Substance, Subsequent Offense under G. L. c. 94C, § 32A(d). At the defendant's sentencing, a question arose regarding the constitutionality of § 32A and this court sentenced the defendant under a different subsection of the statute than he was charged.

Because this court is concerned about the correctness of its sentencing decision, and about the dual structure of § 32A, this court exercises its discretion to report its decision to the Appeals Court. See Mass. R. Crim. P. 24; G. L. c. 231, § 111. There are currently two subsections, with competing mandatory minimum sentences, under which an individual may be charged with possession with the intent to distribute cocaine. It is the apparent practice of prosecutors to generally charge under the more stringent subsection without further justification. Moreover, the presence of two conflicting mandatory minimum sentences for the same conduct appears ambiguous, requiring application of the rule of lenity to individuals convicted under the

FILED on 3/2/15 EJC.

more stringent subsection. In the interest of judicial economy, this court finds it appropriate to report to the Appeals Court the correctness of this court's decision, as well as the following question:

> Does G. L. C. 94, § 32A vest improper discretion in the prosecutor to determine what subsection an individual will be charged under, particularly in light of the statement made to this Court that generally, prosecutors charge individuals under the more stringent subsections of the statute without further explanation or justification; and/or is the statute ambiguous in imposing contradictory mandatory minimum sentences on the same subsequent offense, requiring application of the rule of lenity?

DISCUSSION

Under G. L c. 94C, § 32A, there are two parallel subsections through which an individual may be charged with possession with intent to distribute specific Class B substances. There are also two corresponding subsections imposing stiffer penalties for subsequent offenses, both of which contemplate mandatory minimum sentences. Section 32A(b) provides a mandatory minimum sentence of two years for a defendant convicted of a subsequent offense of possession with intent to distribute any Class B substance, whereas § 32A(d) provides a mandatory minimum sentence of three and one-half years for a defendant convicted of a subsequent offense of possession with intent to distribute "phencyclidine or a controlled substance defined in clause (4) of paragraph (a) or in clause (2) of paragraph (c) of class B." Cocaine, the controlled substance at issue here, is listed in clause (4) of paragraph (a). Thus, two subsections, and two different mandatory minimum sentences, conceivably apply to the defendant's actions.

Although the defendant was indicted and convicted under § 32A(d), this court applied the more lenient § 32A(b) in his sentencing. It appears to this court that the prosecutor has too much

discretion to choose between two separate mandatory minimum sentences for the same conduct, and that the conflicting sentencing guidelines render the statute unconstitutionally vague. The Commonwealth contends that these arguments have been addressed and rejected in Cedeno v. Commonwealth, 404 Mass. 190 (1989), which upheld the validity of the mirroring subsections, and asks this court to impose the mandatory minimum sentence of subsection (d).

A. **Prosecutorial Discretion**

The first issue presented is whether § 32A(b) and § 32A(d) are void for vagueness in vesting excessive discretion in prosecutors to decide between two penalties, both of which may be applicable to the same conduct. In response to a similar question regarding subsections (a) and (c) of the relevant statute, the Supreme Judicial Court has stated that

> "[p]rosecutors have wide ranges of discretion in deciding whether to bring criminal charges and in deciding what specific charges to bring. The policy choice the Legislature granted to prosecutors in § 32A is not inappropriately wide in range. In the absence of any showing that individual prosecutors have acted arbitrarily or unfairly in exercising their discretion, we see no violation of State due process principles resulting from the coexistence of § 32A(a) and § 32A(c)." Cedeno, 404 Mass. at 196-197.

It is apparently the practice of the Commonwealth, at least in Suffolk County, to typically indict defendants for the more serious offenses found in subsections (c) and (d) where cocaine is the relevant controlled substance. In this case, no further reason or justification was offered for the Commonwealth's choice as to which statute to use for the indictment. It is noteworthy, at least to this court, that the defendant's criminal record satisfied only the minimum necessary to qualify as a subsequent offender, though the conduct of which he now stands convicted occurred while he was on probation for his first offense of possession of cocaine with intent to distribute.

This court finds case law precedent noting that due process would be violated with a "showing that individual prosecutors have acted arbitrarily or unfairly in exercising their discretion" particularly applicable here, where it appears that such a showing has been made. See id.

B. **Ambiguity**

The second issue presented is the competing mandatory minimum sentences in subsections (b) and (d) of § 32A. Cedeno, which the Commonwealth contends resolves this question, only addresses subsections (a) and (c), applicable to first violations of the statute. The sentencing guidelines for first violations present less of a clear-cut conflict than those for subsequent violations; § 32A(a) does not provide a mandatory minimum sentence whereas § 32A(c) does. The Supreme Judicial Court concluded specifically that subsections (a) and (c) were not ambiguous. However, the question of ambiguity in the context of two conflicting mandatory minimum sentences has not been directly addressed in Massachusetts. Other jurisdictions have determined that such a conflict requires application of the rule of lenity in favor of the less stringent sentence. See, e.g., United States v. Shaw, 920 F.2d 1225, 1227 (5th Cir. 1991).

In Cedeno, the Supreme Judicial Court concluded that § 32A was not ambiguous in criminalizing possession of cocaine with the intent to distribute. It was "apparent that, if a defendant is convicted under § 32A(a), a particular set of consequences state in that subsection can follow, [and s]imilarly, if a defendant is convicted under § 32A(c), a particular set of consequences stated in that subsection can follow (and a mandatory one-year sentence will follow)." Cedeno, 404 Mass. at 196. The SJC found no constitutional infirmity in the coexistence of these subsections. Id.

In a case analogous to the instant case, the Fifth Circuit considered a statute that provided two different mandatory minimum sentences for the same conduct. See Shaw, 920 F.2d at 1227. A federal law imposed a mandatory minimum sentences of ten years for a person convicted of possessing "100 grams or more of methamphetamine . . . or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine," while simultaneously imposing a mandatory minimum sentence of five years for a person convicted of possessing "100 grams or more of a mixture or substance containing a detectable amount of methamphetamine." Id. at 1227, 1228 n.1. The defendant in that case was convicted of possessing 117.84 grams of a substance containing methamphetamine, and was thus able to be sentenced under either provision. Id. at 1228. Although the court ultimately concluded that the defendant lacked standing to appeal his sentence, it noted that the statute was "facially inconsistent," and that the district court had applied the rule of lenity to the ambiguity. See id. at 1228-1229 (stating "any ambiguity in criminal statutes have long been resolved against the imposition of harsher punishment and in favor of lenity"). In a later case, the Fifth Circuit remanded a sentence involving the same statute where the judge had applied the harsher mandatory minimum sentence, instructing the district court judge to apply the rule of lenity in favor of the lesser sentence. See United States v. Kinder, 946 F.2d 362, 368 (5th Cir. 1991).

"'It is a fundamental tenet of due process that [n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.'" Commonwealth v. Gagnon, 387 Mass. 567, 569 (1982), quoting United States v. Batchelder, 442 U.S. 114, 123 (1979). This applies to "[s]entencing provisions[, which] may violate due process 'if they do not state with sufficient clarity the consequences of violating a given criminal statute.'" United States v. Shaw,

920 F.2d 1225, 1228 (5th Cir. 1991), quoting Batchelder, 442 U.S. at 123. This court construes "any criminal statute strictly against the Commonwealth" when an ambiguity arises. See Gagnon, 387 Mass. at 569. Unlike in Cedeno, the subsections at issue here provide two different mandatory minimum sentences for the same conduct, which other courts have determined is "facially inconsistent." See Shaw, 920 F.2d at 1228. Generally, ambiguities should be "resolved against the imposition of harsher punishment and in favor of lenity." Id., citing Hughey v. United States, 495 U.S. 411 (1990); United States v. Kinder, 946 F.2d 362, 368 (5th Cir. 1991) (remanding sentence on harsher of two mandatory minimum sentences to apply rule of lenity in favor of lesser sentence).

For all of these reasons, the defendant has been sentenced under § 32A(b), the more lenient subsection.

ORDER

For the foregoing reasons, it is hereby ordered that the defendant is sentenced to a minimum of two years and a maximum of two years and one day, pursuant to G. L. c. 94C, § 32A(b). This court's sentencing decision and question is reported to the Appeals Court, and the defendant's sentence is stayed pending a decision by the Appeals Court.

Elizabeth M. Fahey
Justice of the Superior Court

Dated: 2/27, 2015

COMMONWEALTH'S RECORD APPENDIX

INDICTMENT

Possession of Class B Controlled Substance with Intent to Distribute
C. 94C, §32A(c)

C.A.1

Commonwealth of Massachusetts

SUFFOLK, SS.

At the SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT FOR CRIMINAL BUSINESS,

begun and holden at the CITY OF BOSTON, within and for the County of Suffolk, on the first Monday of January in the year of our Lord two thousand and fourteen.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

MOSES EHIABHI,

on June 27, 2013, did unlawfully, knowingly and intentionally possess with intent to distribute a certain controlled substance, to wit: cocaine, a Class B controlled substance under the provisions of G.L. c. 94C, § 31.

INDICTMENT

Possession of Class B Controlled Substance with Intent to Distribute
C.A.2
C. 94C, §32A(d)
Subsequent Offense

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

MOSES EHIABHI,

on March 3, 2009, prior to the commission of the offense heretofore described in this indictment was convicted in the United States District Court of New Hampshire of the offense of Distribution of Class B controlled substance and Possession with Intent to Distribute Class B, Docket # 08-CR-92-SM, and this is therefore a subsequent such offense.

A TRUE BILL

Assistant District Attorney

Foreman of the Grand Jury

Superior Court Department - Criminal Business

January, Sitting, 2014

JAN 13 2014

Returned into said Superior Court by the Grand Jurors and ordered to be filed.

Clerk Of Court

INDICTMENT

Operating Under the Influence of a Controlled Substance
c.90, §24(1)(a)(1)

Commonwealth of Massachusetts

SUFFOLK, SS.

At the SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT FOR CRIMINAL BUSINESS, begun and holden at the CITY OF BOSTON, within and for the County of Suffolk, on the first Monday of January in the year of our Lord two thousand and fourteen.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

MOSES EHIABHI,

on June 27, 2013, upon a certain way in the City of Boston, to wit: Norfolk Avenue, did operate a certain motor vehicle, to wit: an automobile, while he, the said Moses Ehiabhi was under the influence of a controlled substance as defined in §1 of c.94C of the General Laws of Massachusetts.

A TRUE BILL

Assistant District Attorney

Foreman of the Grand Jury

Superior Court Department - Criminal Business *January, Sitting, 2014*

JAN 13 2014

Returned into said Superior Court by the Grand Jurors and ordered to be filed.

Clerk Of Court

INDICTMENT C.A.4 **Assault and Battery on a Police Officer C. 265, §13D**

Commonwealth of Massachusetts

SUFFOLK, SS.

At the SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT FOR CRIMINAL BUSINESS, begun and holden at the CITY OF BOSTON, within and for the County of Suffolk, on the first Monday of January in the year of our Lord two thousand and fourteen.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

MOSES EHIABHI,

on June 27, 2013, did assault and beat Andrew Hunter, who was a police officer of Boston, and who also was engaged in the lawful discharge of his duties as such officer, as said MOSES EHIABHI well knew.

A TRUE BILL

Assistant District Attorney

Foreman of the Grand Jury

Superior Court Department - Criminal Business *January, Sitting, 2014*

JAN 13 2014

Returned into said Superior Court by the Grand Jurors and ordered to be filed.

Clerk Of Court

INDICTMENT C.A.5 **Resisting Arrest C. 268, §32B**

Commonwealth of Massachusetts

SUFFOLK, SS.

At the SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT FOR CRIMINAL BUSINESS, begun and holden at the CITY OF BOSTON, within and for the County of Suffolk, on the first Monday of January in the year of our Lord two thousand and fourteen.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

MOSES EHIABHI,

on June 27, 2013, did knowingly prevent or attempt to prevent a police officer, acting under official authority from effecting an arrest or the actor, or another by use or threat of use of physical force of violence against the officer or another, or through use of any other means which creates a substantial risk of causing bodily injury to such police officer or another, in violation of G.L. c. 268 §32B.

A TRUE BILL

Assistant District Attorney

Foreman of the Grand Jury

Superior Court Department - Criminal Business *January, Sitting, 2014*

JAN 13 2014

Returned into said Superior Court by the Grand Jurors and ordered to be filed.

Clerk of Court

CRTR2709-CR

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CRIMINAL
Docket Report

1484CR10019
Commonwealth vs. Ehiabhi, Moses M

CASE TYPE:	Indictment	**FILE DATE:**	01/13/2014
ACTION CODE:	94C/32A/B-0	**CASE TRACK:**	B - Complex
DESCRIPTION:	COCAINE, DISTRIBUTE, SUBSQ.OFF. c94C §32A(d)		
CASE DISPOSITION DATE	12/17/2014	**CASE STATUS:**	Open
CASE DISPOSITION:	Disposed by Jury Verdict	**STATUS DATE:**	08/12/2015
CASE JUDGE:		**CASE SESSION:**	Criminal 2

LINKED CASE

DCM TRACK

Tickler Description	Due Date	Completion Date
Pre-Trial Hearing	01/22/2014	08/12/2015
Final Pre-Trial Conference	10/05/2014	08/12/2015
Case Disposition	10/19/2014	08/12/2015

PARTIES

Prosecutor **563839**
Commonwealth
Suffolk County District Attorney
One Bulfinch Place
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Office of Suffolk County D.A.
Office of Suffolk County D.A.
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Added Date: 07/28/2016

Defendant
Ehiabhi, Moses M
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Lynn, MA 01905

Private Counsel **638629**
Dolven, Sarah E.
Attorney at Law
Attorney at Law
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Work Phone (413) 253-8911
Added Date: 01/29/2015

Other interested party
Stanton, Clerk, Hon. Joseph
Clerk of the Appeals Court
John Adams Courthouse, Suite 1200
One Pemberton Square
Boston, MA 02108-1705

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CRIMINAL
Docket Report

PARTY CHARGES

#	Offense Date/ Charge	Code	Town	Disposition	Disposition Date
1	06/27/2013	94C/32A/B-0	Boston		
	COCAINE, DISTRIBUTE, SUBSQ.OFF. c94C §32A(d)				
				Guilty Verdict	12/17/2014
2	06/27/2013	90/24/F-5	Boston		
	OUI-DRUGS c90 §24(1)(a)(1)				
				Not Guilty Verdict	12/17/2014
3	06/27/2013	265/13D/A-0	Boston		
	A&B ON POLICE OFFICER c265 §13D				
				Guilty Verdict	12/17/2014
4	06/27/2013	268/32B-0	Boston		
	RESIST ARREST c268 §32B				
				Not Guilty Finding	12/16/2014

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CRIMINAL
Docket Report

EVENTS				
Date	Session	Event	Result	Resulting Judge
01/22/2014	Magistrate's Session	Arraignment	Held as Scheduled	
02/05/2014	Magistrate's Session	Hearing	Not Held	
02/24/2014	Magistrate's Session	Pre-Trial Conference	Held as Scheduled	
03/13/2014	Magistrate's Session	Pre-Trial Conference	Held as Scheduled	
04/17/2014	Magistrate's Session	Status Review	Rescheduled	
05/06/2014	Magistrate's Session	Status Review	Held as Scheduled	
05/12/2014	Magistrate's Session	Pre-Trial Conference	Held as Scheduled	
06/11/2014	Criminal 1	Pre-Trial Hearing	Canceled	
06/19/2014	Magistrate's Session	Pre-Trial Conference	Rescheduled	
07/16/2014	Criminal 1	Pre-Trial Hearing	Held as Scheduled	
08/20/2014	Magistrate's Session	Hearing	Held as Scheduled	
09/04/2014	Criminal 5	Final Pre-Trial Conference	Canceled	
09/30/2014	Criminal 5	Jury Trial	Canceled	
10/08/2014	Criminal 9	Non-Evidentiary Hearing on Suppression	Rescheduled	
10/16/2014	Criminal 5	Final Pre-Trial Conference	Not Held	
10/16/2014	Criminal 3	Final Pre-Trial Conference	Not Held	
10/20/2014	Criminal 2	Final Pre-Trial Conference	Held as Scheduled	
10/30/2014	Criminal 5	Jury Trial	Not Held	
10/30/2014	Criminal 2	Jury Trial	Canceled	
10/30/2014	Criminal 9	Evidentiary Hearing on Suppression	Rescheduled	
11/04/2014	Criminal 9	Evidentiary Hearing on Suppression	Held as Scheduled	
12/12/2014	Criminal 2	Jury Trial	Held as Scheduled	
12/15/2014	Criminal 2	Jury Trial	Held as Scheduled	
12/16/2014	Criminal 2	Jury Trial	Held as Scheduled	
12/17/2014	Criminal 2	Jury Trial	Held as Scheduled	
12/19/2014	Criminal 2	Hearing for Sentence Imposition	Held as Scheduled	

FINANCIAL SUMMARY					
	Fees/Fines/Costs	Assessed	Paid	Dismissed	Balance
	Total	0.00	0.00	0.00	0.00

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CRIMINAL
Docket Report

Deposit Account(s) Summary	Received	Applied	Checks Paid	Balance
Total	1,250.00			1,250.00

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CRIMINAL
Docket Report

INFORMATIONAL DOCKET ENTRIES			
Date	**Ref**	**Description**	**Judge**
01/13/2014	1	Indictment returned as to offense #001-(Subsequent)	
01/13/2014	2	MOTION by Commonwealth for summons of Deft to appear; filed & allowed (Locke, RAJ)	
01/13/2014		Summons for arraignment issued ret January 22/2014	
01/22/2014		Defendant came into court.	
01/22/2014		Committee for Public Counsel Services appointed, pursuant to Rule 53 - Elliot R. Levine, for arraignment only. (Attorney Jorge Serpa thereafter)	
01/22/2014		Deft arraigned before Court	
01/22/2014		Deft waives reading of indictment	
01/22/2014		RE Offense 1:Plea of not guilty	
01/22/2014		RE Offense 2:Plea of not guilty	
01/22/2014		RE Offense 3:Plea of not guilty	
01/22/2014		RE Offense 4:Plea of not guilty	
01/22/2014		Bail set: $7,500.00 Surety or in the alternative $750.00 cash, set without prejudice. Bail Warnings Read. Bail transfer filed from Roxbury District Court, docket #13-2064.	
01/22/2014	3	Commonwealth files Statement of the case.	
01/22/2014		Case continued to 2/5/2014 by agreement for setting of the track in the Magistrate Session, Ctrm 705. Wilson, MAG - S.Sherwood, ADA - JAVS/ERD - E. Levine for J. Serpa D/C, Attorneys	
01/22/2014		Assigned to Track "B" see scheduling order	
02/06/2014		Defendant not present, case continued until 2/24/2014 by agreement for hearing Re: PTC and Setting of tracking order. Wilson, MAG - G. Sherwood, ADA - JAVS	
02/24/2014		Defendant came into court (Note: Deft arrived late at 10:15am)	
02/24/2014	4	Commonwealth files Notice of Discovery, Feb 24, 2014.	
02/24/2014		Tracking deadlines Active since return date	
02/24/2014		Continued to 3/13/2014 for hearing Re: PTC by agreement.	
02/24/2014		Continued to 6/11/2014 for hearing Re: PTH by agreement.	
02/24/2014		Continued to 9/4/2014 for hearing Re: FPTC at 2pm in Rm. 817 by agreement.	
02/24/2014		Continued to 9/30/2014 for trial by agreement in Rm. 817. Wilson, MAG - G. Sherwood, ADA - JAVS - J. Serpa, Atty.	
02/24/2014		Case Tracking scheduling order (Gary D. Wilson. Magistrate) mailed 2/24/2014	
03/13/2014		Defendant came into court.	

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03/13/2014	5	Pre-trial conference report filed
03/13/2014	6	Deft files Motion for funds for an investigator.
03/13/2014		MOTION (P#6) allowed up to $1,500.00.
03/13/2014		Continued to 4/17/2014 for hearing Re: Filing of motions by agreement. Wong, MAG - G. Sherwood, ADA - JAVS - J. Serpa, Atty.
04/17/2014		Defendant not present, case continued until 5/6/2014 by agreement for motions filing. Wong, MAG - G. Sherwood, ADA - ERD (G. Sherwood, ADA and J. Serpa, Atty notified; copies of notice in file)
05/06/2014		Defendant came into court.
05/06/2014		Attorney Jose Serpa's oral motion to withdraw is allowed.
05/06/2014		Appointment of Counsel Craig E Collins, pursuant to Rule 53. No additional 211D fee.
05/06/2014		Continued to 5/12/2014 for hearing Re: PTC and setting of tracking order by agreement. Wilson, MAG - J. Serpa, Atty - JAVS
05/12/2014		Defendant came into court. Track amended due to change in counsel.
05/12/2014		Continued to 6/19/2014 for PTC by agreement.
05/12/2014		Continued to 7/16/2014 for hearing Re: PTH by agreement.
05/12/2014		Continued to 10/16/2014 for hearing Re: FPTC by agreement at 2pm in Rm. 817.
05/12/2014		Continued to 10/30/2014 for hearing Re: trial by agreement in RM. 817. Wilson, MAG - G. Sherwood, ADA - C. Collins, Atty -JAVS
05/12/2014		Case Tracking scheduling order (Gary D. Wilson. Magistrate) mailed 5/12/2014
05/12/2014	7	Notice of withdrawal of counsel effective May, 30, 2014 filed.
06/19/2014		Defendant not present, case on track for 7-16-14 for PTH. Note; PTC must be filed on 7-16-14. Wilson, MAG - C. Collins, Atty - JAVS
07/16/2014		Defendant comes into court for - PTH held
07/16/2014	8	Commonwealth files Certificate of Compliance regarding Pre-Trial Discovery
07/16/2014	9	Commonwealth files Notice of Discovery, July 15, 2014
07/16/2014		Continued to 8/20/2014 by agreement for filing motions in Mag. session. Roach, J - G. Sherwood, ADA - O. Collins, Atty - JAVS
08/20/2014		Defendant came into court.
08/20/2014	10	Deft files Motion to Suppress Evidence with Affidavit.
08/20/2014		Continued to 10/8/2014 for hearing Re: Motion to Suppress by agreement (1 hour). Wong, MAG - G. Sherwood, ADA - C. Collins, Atty - JAVS
08/21/2014		Defendant not present.
08/21/2014	11	Deft files Ex Parte Motion for funds.
08/21/2014		MOTION (P#11) allowed. Wong, MAG - C. Collins, Atty - JAVS

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10/02/2014	12	Deft files Motion for Rule 17 Summons with affidavit in support thereof.
10/02/2014		MOTION (P#12) allowed as endorsed. Copy given to Attorney in hand 10/2/14. Hely, J. - G. Sherwood, ADA - C. Collins, Attorney.
10/08/2014		Defendant came into court.
10/08/2014	13	Commonwealth files Motion to Continue Trial.
10/08/2014		Motion to Continue Trial P#13, Allowed as to Motion to Suppress Denied as to Motion for New Trial.
10/08/2014		Continued by agreement to 10/30/2014 for hearing on Motion to Suppress. Case has next Court date of 10/20/14 for FPTC Second Session Courtroom 806.Ames, J. - G. Sherwood, ADA - C. Collins, Attorney - Javs.
10/20/2014		Defendant came into court (late) for FPTC.
10/20/2014	14	Filed: Joint Pre-Trial Memorandum
10/20/2014	15	Commonwealth files Joint Motion to Continue Trial. After hearing, motion is allowed by agreement. Rule 36 waived from 10/30/14 to 12/12/14.
10/20/2014	16	Deft files Joint Pre-Trial Memorandum
10/20/2014		Con't to 10/30/14 for MTS in Ninth Session (Ct. Rm. 713). AND thence to 12/12/14 at 9AM by agreement for Trial in Second Session (Ct. Rm. 808). Fahey, J. - G. Sherwood, ADA - C. Collins, Atty. - C. Lavalle, C/R.
10/23/2014	17	Deft files Memorandumj of Law in Support of Motion to Suppress Evidence.
10/29/2014		Defendant not present, continued by agreement until 11/4/2014 for Hearing re: Motion to Suppress. G. Sherwood, ADA - C. Collins, Attorney.
11/04/2014		Defendant came into court. Defendant arrives late to Court.
11/04/2014		Court orders Defendant taken into custody and held on a Mittimus Without Bail.
11/04/2014	18	Commonwealth files Memorandum in Opposition to Defendant's Motion to Suppress.
11/04/2014		After hearing Motion to Suppress P#10, taken under advisement.
11/04/2014		Court orders prior order of Mitt W/O Bail revoked. Court orders prior order of bail $750.00 Cash reinstated. Discharge Issued. Ames, J. - G. Sherwood, ADA - C. Collins, ADA - Javs Courtroom 713.
11/05/2014		MOTION to Suppress (P#10) denied. Court dictates findings on record on 11/5/14. Court orders that transcripts be provided to the parties. Ames, J. - JAVS.
12/12/2014		Defendant came into court.
12/12/2014	19	Commonwealth files motion for judical inquiry into criminal history of potential jurors
12/12/2014	20	Commonwealth files motion in limine to introduce expert testimony

12/12/2014		MOTION (P#19) allowed .
12/12/2014		MOTION (P#20) allowed . The Commonwealth moves for trial . The Court orders 14 jurors enpanelled, not sworn. Continued to 12/15/14 for trial. Fahey, J. - G. Sherwood, ADA - C. Lavallee, CR - C. Collins, ATTY
12/15/2014		Defendant came into court .
12/15/2014	21	Deft files motion in limine to preclude reference to officer injury
12/15/2014	22	Deft files motion in limine to preclude hearsay evidence . Jurors sworn, indictments read. Trial on Offenses #001,002,003 and 004 with 14 jurors present. Feahey. J. - G. Sherwood, ADA - Javs/C. Lavallee, CR - C. Collins, ATTY
12/16/2014		Defendant came into court .
12/16/2014	23	Deft files supplemental request for jury instructions . Trial continues with fourteen (14) jurors present. The Commonwealth rests.
12/16/2014	24	Deft files motion for a required finding of not guilty
12/16/2014		MOTION (P#24) allowed as to Offense #004 only (Resisting arrest) denied as to the remaining offenses. Defendant rests.
12/16/2014	25	Deft files motion for required finding of not guilty at close of all evidence
12/16/2014		MOTION (P#25) denied (Elizabeth M. Fahey, Justice). - G. Sherwood, ADA - C. Lavallee, CR - C. Collons, ATTY
12/16/2014		RE Offense 4:Not guilty finding
12/17/2014		Defendant came into court . Trial continues before Fahey, J. with 14 jurors present. At the time of final submission of the case to the jury the Court selects juror "MN" in seat # 13 as forperson of the jury. Juror "KH" in seat #3 and "AI" in seat # 5 were drawn as alternate jurors. Deliberations commence.
12/17/2014		RE Offense 1:Guilty verdict
12/17/2014	26	Verdict affirmed, verdict slip filed
12/17/2014		RE Offense 2:Not guilty verdict
12/17/2014	27	Verdict affirmed, verdict slip filed
12/17/2014		RE Offense 3:Guilty verdict
12/17/2014	28	Verdict affirmed, verdict slip filed
12/17/2014		Bail revoked
12/17/2014		Mittimus without bail issued to Suffolk County Jail (Nashua Street)
12/17/2014		Deft arraigned before Court on the subsequent Offense portion of # 001.
12/17/2014		Plea of not guilty . Defendant set at bar. Indictment read . Trial commences before Fahey, J with the same 14 jurors for the instant offenses. At the final submission of the case to the jury the Court selects juror in seat #13 as foreperson.Juror in seat #2 and #8 were drawn as alternate jurors.

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12/17/2014	29	Verdict of guilty as to Offense #001 as to the subsequent offense portion. Verdict affirmed, verdict slip filed. The Commonwealth moves for sentencing. Continued to 12/19/14 at 2:00pm for sentencing. Jail list. Fahey, J. - G. Sherwood, ADA - L. Tyler, CR - C. Collins, ATTY
12/19/2014		Defendant brought into court .
12/19/2014	30	Commonwealth files sentencing memorandum
12/19/2014	31	Deft files response to Commonwalth's sentencing memorandum.
12/19/2014	32	Deft files motion to stay
12/19/2014	33	Deft files motion to withdraw as counsel
12/19/2014	34	Deft files notice of appeal of conviction
12/19/2014	35	Deft files motion for appointment of appellate counsel . The Commonwealth moves for sentencing.
12/19/2014		MOTION (P#32) allowed .
12/19/2014		MOTION (P#35) allowed .
12/19/2014		Defendant sentenced as to Offense #001 - MCI Cedar Junction - Max Two (2) years and One (1) day - Min Two (2) years . The Court orders defendant sentenced under c94C sect 32A(b). Sentence stayed pending appeal.
12/19/2014		Sentence credit given as per 279:33A: 26 days
12/19/2014		Defendant sentenced as to Offense #002 - Probation for a period of Two (2) years from and after #001. Conditions of probation ; Obtain a GED, Seek and maintain employment., drug screening and evaluation.
12/19/2014		Victim-witness fee assessed: $90.00
12/19/2014		Defendant warned per Chapter 22E Sec. 3 of DNA
12/19/2014		Defendant warned of potential loss of license.
12/19/2014		Notified of right of appeal under Rule 64
12/19/2014		Drug fee assessed: $150.00
12/19/2014		Probation supervision fee assessed: $65.00. All fees are stayed pendind appeal. Fahey, J. retains jurisdiction.
12/19/2014		Bail set: $12,500.00 with surety or $1250.00 cash of which $750.00 was previously posted for an additional $500.00 cash .
12/19/2014		Bail warning read
12/19/2014	36	NOTICE of APPEAL FILED by Commonwealth
12/19/2014	37	The Court files memorandum of decision and order on defendant's motion for stay of sentence filed. Fahey, J. - G. Sherwood, ADA - C. Lavallee, CR - C. Collins, ATTY
01/23/2015	38	Appearance of Deft's Atty: Sarah E Dolven,filed
01/26/2015	39	Appearance of Deft's Atty: Sarah E Dolven
03/02/2015	40	Report of Correctness of Sentence to the Appeals Court Pursuant to Mass. R. Crim. P. 34 and G.L. Ch. 231, Sect. 111 . Fahey, J.

03/09/2015		Notice of completion of assembly of record sent to clerk of Appeals Court and attorneys for the Commonwealth and defendant.
03/09/2015		Two (2) certified copies of docket entries, and copy of the notice of appeal(Paper #36),(Report of Correctness of Sentence to the Appeals Court(Paper #40) each transmitted to clerk of appellate court.
03/16/2015	41	Notice of Entry of appeal received from the Appeals Court. Case was entered in this court on March 9, 2015
04/17/2015	42	Notice of Docket Entry Received from the Appeals Court: RE#6: Appellate Proceedings STAYED to 6/15/2015 . Status Due then Concerning Transcript. Notice /attest.
08/12/2015		Court Reporter Javs SUF CR 9 is hereby notified to prepare one copy of the transcript of the evidence of 11/04/2014
08/12/2015		Court Reporter LaVallee, Carol is hereby notified to prepare one copy of the transcript of the evidence of 12/12/15/16/19/2014. Trial before Fahey, J
08/12/2015		Court Reporter Javs SUF CR 2 is hereby notified to prepare one copy of the transcript of the evidence of 12/15/2014 Trial before Fahey, J
08/12/2015		Court Reporter Tyler, Elizabeth C. is hereby notified to prepare one copy of the transcript of the evidence of 12/17/2014 Trial before Fahey, J
08/13/2015	43	Order for Transcript Cancelled Javs SUF CR 9 for event on 11/04/2014
09/26/2015		**Converted and manual data; Converted from MassCourt Lite, BasCot or ForeCourt(09/26/2015). Refer to case file for assessments, disbursements, and receipt validations.**
09/26/2015		** On 01/27/2014 $750.00 was received for case SUCR2014-10019, funds received by the surety Moses M. Ehiabhi. The defendant in the case is Moses Ehiabhi. As of the date of conversion a remaining balance of $750.00 was converted for BAIL.
09/26/2015		** On 12/30/2014 $500.00 was received for case SUCR2014-10019, funds received by the surety Moses Ehiabi, Sr.. The defendant in the case is Moses Ehiabhi. As of the date of conversion a remaining balance of $500.00 was converted for BAIL.
03/08/2016		CD of Transcript of 12/17/2014 09:00 AM Jury Trial received from Court Reporter Elizabeth Tyler.
03/09/2016		CD of Transcript of 12/15/2014 09:00 AM Jury Trial received from Court Reporter JAVS.
04/28/2016		CD of Transcript of 12/12/2014 09:00 AM Jury Trial, 12/15/2014 09:00 AM Jury Trial, 12/16/2014 09:00 AM Jury Trial, 12/19/2014 02:00 PM Hearing for Sentence Imposition received from Court Reporter Carol LaVallee.
07/19/2016		Notice sent to attorneys that transcripts are available. CDs of requested transcripts copied and sent to J. Zanini, A.D.A., and S. Dolven, Atty. (Sent 7/19/16)

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07/19/2016		Notice sent to attorneys that transcripts are available. Transcripts Sent to J Zanini, ADA and S Dolven, ATTY
07/28/2016		Appeal: notice of assembly of record sent to the Appeals Court Applies To: Ehiabhi, Moses M (Defendant); Zanini, Esq., John P (Attorney) on behalf of Commonwealth (Prosecutor); Dolven, Esq., Sarah E. (Attorney) on behalf of Ehiabhi, Moses M (Defendant)
07/28/2016		Statement of Case Appeal filed:
08/01/2016	44	Notice of docket entry received from Appeals Court the above-referenced case was entered in this Court on July 29, 2016. FILED.
08/10/2016	45	Notice of docket entry received from Appeals Court Order: The Parties' cross-appeals in 15-P-314 and 16-P-1044 are hereby consolidated for breifing and decision. 15-P-314 is closed. All papers shall be transferred to 16-P-1044, and all future filings shall refere only to 16-P-1044. The Commonwealth's brief and appendix in the consolidated appeal is due on or before 9-7-16.

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SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
No. SUCR2014-10019

COMMONWEALTH

v.

MOSES EHIABHI

COMMONWEALTH'S SENTENCING MEMORANDUM

The defendant, Moses Ehiabhi, was indicted by a Suffolk County Grand Jury for the following offenses: Possession with Intent to Distribute a Class B Substance under M.G.L. ch. 94C § 32A(c) and Subsequent Offense under M.G.L. ch. 94C § 32A(d); Resisting Arrest under M.G.L. ch. 268 § 32B; Assault and Battery on a Police Officer under M.G.L. ch. 265 § 13D; and Operating Under the Influence of Drugs under M.G.L. ch. 90 § 24(1)(a)(1). After a jury trial, the jury returned guilty verdicts on the charges of Possession with Intent to Distribute a Class B Substance under M.G.L. ch. 94C § 32A(c) and Assault and Battery on a Police Officer under M.G.L. ch. 265 § 13D. After a second trial on the charge of Possession with Intent to Distribute a Class B Substance, Subsequent Offense under M.G.L. ch. 94C § 32A(d), the same jury (with different alternate jurors), returned a guilty verdict on that charge as well.

Under M.G.L. ch. 94C § 32A, there are two different subsections under which a defendant can be charged for possession with intent to distribute a Class B substance. Section 32A(a) states the following:

"Any person who knowingly or intentionally manufactures, distributes, dispenses, or possesses with intent to manufacture, distribute or dispense a controlled substance in Class B of

section thirty-one shall be punished by imprisonment in the state prison for not more than ten years, or in a jail or house of correction for not more than two and one-half years, or by a fine of not less than one thousand nor more than ten thousand dollars, or both such fine and imprisonment."

Section 31 of Chapter 94C defines a Class B substance as the following:

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate

(2) Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in paragraph (1) except that these substances shall not include the isequinoline alkaloids of opium

(3) Opium poppy and poppy straw

(4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocain or ecgonine.

(5) Phenyl-2-Propanone (P2P)

(6) Phenylcyclohexylamine (PCH)

(7) Piperidinocyclohexanecarbonitrile (PCC)

(8) 3,4-methylenedioxy methamphetamine (MDMA).

(b) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including isomers, esters, ethers, salts, and salts of isomer, esters, and ethers, whenever the existence of such isomers, esters, ethers and salts is possible within the specific chemical designation:

(1) Alphaprodine

(2) Anileridine

(3) Bezitramide

(4) Dihydrocodeine

(5) Diphenoxylate

(6) Fentanyl

(7) Isomethadone

(8) Levomethorphan

(9) Levorphanol

(10) Metazocine

(11) Methadone

(12) Methadone-Intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane

(13) Moramide-Intermediate, 2-methyl-3 morpholine-1, 1-diphenyl-propane carboxylic acid

(14) Pethidine

(15) Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine

(16) Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate

(17) Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid

(18) Phenazocine

(19) Piminodine

(20) Racemethorphan

(21) Racemorphan

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers.

(2) Any substance which contains any quantity of methamphetamine, including its salts, isomers and salts of isomers.

(3) Phenmetrazine and its salts.

(4) Methylphenidate.

(d) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system:

(1) Any substance which contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid.

(2) Any substance which contains any quantity of methaqualone, or any salt or derivative of methaqualone.

(c) Unless specifically excepted or listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Lysergic acid

(2) Lysergic acid amide

(3) Lysergic acid diethylamide

(4) Phencyclidine.

Section 32A(b) of Chapter 94C states the following:

"Any person convicted of violating this section after one or more prior convictions of manufacturing, distributing, dispensing, or possessing with the intent to manufacture, distribute or dispense a controlled substance as defined by section thirty-one of this chapter under this or any other prior law of this jurisdiction or of any offense of any other jurisdiction, federal, state,

or territorial, which is the same as or necessarily includes the elements of said offense shall be punished by a term of imprisonment in the state prison for not less than 2 nor more than ten years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of 2 years and a fine of not less than two thousand and five hundred nor more than twenty-five thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein."

Therefore, a person indicted and convicted under Chapter 94C, Section 32(a) who is also convicted as a subsequent offender under section (b), will be required to serve a mandatory minimum sentence of two years in the state prison. However, there is also a second subsection of Chapter 94C, Section 32(c) which states the following:

"Any person who knowingly or intentionally manufactures, distributes, dispenses or possesses with intent to manufacture, distribute or dispense phencyclidine or a controlled substance defined in clause (4) of paragraph (a) or in clause (2) of paragraph (c) of class B of section thirty-one shall be punished by a term of imprisonment in the state prison for not less than two and one-half nor more than ten years or by imprisonment in a jail or house of correction for not less than one nor more than two and one-half years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of one year and a fine of not less than one thousand nor more than ten thousand dollars may be imposed but not in lieu of the mandatory minimum one year term of imprisonment, as established herein."

Section 31 of Chapter 94C sets forth that a controlled substance under clause (4) of paragraph (a) is: "Coca leaves and any salt, compound, derivative, or preparation of coca leaves,

and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocain or ecgonine;" and that a controlled substance under clause (2) of paragraph (c) is: "any substance which contains any quantity of methamphetamine, including its salts, isomers and salts of isomers."

Section 32A(d) of Chapter 94C states the following:

"Any person convicted of violating the provisions of subsection (c) after one or more prior convictions of manufacturing, distributing, dispensing or possessing with the intent to manufacture, distribute, or dispense a controlled substance, as defined in section thirty-one or of any offense of any other jurisdiction, either federal, state or territorial, which is the same as or necessarily includes, the elements of said offense, shall be punished by a term of imprisonment in the state prison for not less than 31/2 nor more than fifteen years and a fine of not less than two thousand five hundred nor more than twenty-five thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein."

Therefore, a person indicted and convicted under Chapter 94C, Section 32(c) who is also a convicted as a subsequent offender under section (d), will be required to serve a mandatory minimum sentence of three and a half years in the state prison.

In this case, Moses Ehiahbi was indicted for Possession with Intent to Distribute a Class B substance, to wit: cocaine, under Chapter 94C, Section 32(c), and was indicted as a subsequent offender under Chapter 94C, Section 32(d). He was also found guilty of both of those offenses in two separate jury trials. Therefore, the court must sentence him to a term of imprisonment in the state prison for not less than three and one half years in the state prison.

The Defendant raised two issues at the time of sentencing in this case: (1) whether or not Chapter 94C, Section 32A should be void for vagueness, and (2) whether Chapter 94C, Section 32A allows for improper discretion on the part of the prosecutor to choose under which section of the statute the defendant should be charged when the Class B substance in question is cocaine. The case of *Cedeno v. Commonwealth* is directly on point regarding both issues. 404 Mass. 190 (1989). In *Cedeno*, the defendant specifically addresses the discrepancy in sentencing for the same crime of possession with intent to distribute a Class B substance, to wit: cocaine. *Id.* The defendant in that case argued first that "...§32A(a) and §32A(c) are void for vagueness because a person could not tell until charged under one or the other subsection whether he was risking a mandatory minimum prison term." *Id.* at 193. The Court first notes that "[t]he concept that a criminal statute may be void for vagueness is based in part on the principle that a person should be able to know what conduct is criminal and what will be the consequences to him in violation of that statute." *Id.*

The Court cites *United States v. Batchelder* regarding the analysis under the Fourteenth Amendment to the United States Constitution in reference to two statutes which addressed the same crime yet assigned different penalties, and quotes: "[a]lthough the statutes create uncertainty as to which crime may be charged and therefore what penalties may be imposed, they do so to no greater extent than would a single statute authorizing various alternative punishments. So long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied." *Id.* at 193-194 quoting *United States v. Batchelder*, 442 U.S. 114, 123 (1979). The Court notes that this holding is based upon principles of Federal as opposed to State due process of law; however, the Court also states that "[w]e need not decide whether the State standard is stricter

than the Federal standard. We simply see no significant ambiguity in the legislative intent expressed in §32A(a) and §32A(c)." *Id.* at 194. The Court goes on to hold: "...there is no uncertainty about what the Legislature has provided in *§ 32A*. *Section 32A* (*a*) proscribes certain conduct and prescribes a range of penalties for its violation. *Section 32A* (*c*) proscribes certain conduct which also falls within the conduct proscribed by *§ 32A* (*a*) and prescribes a range of penalties. No one can be confused about what the Legislature intended. If a person possesses cocaine with the intent to distribute it, that conduct is criminal. That point is clear. The Legislature has said it twice in *§ 32A*. It is equally apparent that, if a defendant is convicted under *§ 32A* (*a*), a particular set of consequences stated in that subsection can follow. Similarly, if a defendant is convicted under *§ 32A* (*c*), a particular set of consequences stated in that subsection can follow (and a mandatory one-year sentence will follow). If there is a problem in a constitutional sense in the coexistence of *§ 32A* (*a*) and *§ 32A* (*c*), it does not lie in any uncertainty about what those sections mean." *Id.* at 196.

The second argument made by the defendant is *Cedeno* is that "*§ 32A* (*a*) and *§ 32A* (*c*) are void for vagueness because they vest excessive discretion in prosecutors and judges to decide the penalty to which an accused will be exposed." *Id.* The Court goes on to say: "[t]he sentencing discretion granted by *§ 32A* (*a*) or by *§ 32A* (*c*) to judges is no greater than that granted by many criminal statutes. The prosecutor, not the judge, decides whether a person is to be charged under *§ 32A* (*a*) or under *§ 32A* (*c*)." *Id.* The Court holds: "Prosecutors have wide ranges of discretion in deciding whether to bring criminal charges and in deciding what specific charges to bring. The policy choice the Legislature granted to prosecutors in *§ 32A* is not inappropriately wide in range. In the absence of any showing that individual prosecutors have acted arbitrarily or

unfairly in exercising their discretion, we see no violation of State due process principles resulting from the coexistence of *§ 32A (a)* and *§ 32A (c)*." *Id.* at 196-197.

CONCLUSION

The defendant was indicted under Section 32A(c) of Chapter 94C for Possession with Intent to Distribute a Class B substance, to wit: cocaine. He was also indicted under Section 32A(d) as a subsequent offender. The Supreme Judicial Court is clear that this statute cannot be void for ambiguity. The Court also clearly held that it is entirely within the discretion of the prosecutor under which portion of the statute that the defendant shall be indicted when the Class B substance in question is cocaine. Further, it is clear that when the defendant is indicted and convicted under Section 32A(c), and the defendant is also convicted as a subsequent offender under Section 32A(d), the mandatory minimum penalty is three and a half years in the state prison. Moses Ehiabhi was indicted and convicted for possession with intent to distribute cocaine under Section 32A(c), and was also convicted as a subsequent offender under Section 32A(d). Therefore, the mandatory minimum sentence for the defendant must be no less than three and a half years in the state prison.

Respectfully submitted
FOR THE COMMONWEALTH,

DANIEL F. CONLEY
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For the Suffolk District

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December 18, 2014

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COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT

Suffolk, ss.

Criminal Action
Docket No. 2014-10019

COMMONWEALTH
v.
MOSES EHIABHI

DEFENDANT'S RESPONSE TO COMMONWEALTH'S SENTENCING MEMORANDUM

Cedeno v. Commonwealth, 404 Mass. 190 (1989) is readily distinguishable from the case at bar, as the statutory disparities in Cedeno were far less vague and confusing than the situation presented by the instant case. In Cedeno the SJC dealt with two statutory subsections, one of which did not impose a mandatory minimum and one of which did impose a mandatory minimum sentence of one year. Today we are dealing with two different and contradictory mandatory minimums for the same criminal conduct. The present statutory scheme poses a far greater risk of confusion to the average citizen than in the Cedeno case.

A statute that provides two different mandatory minimums for the same conduct is just as vague as a law that establishes two different minimum wages or two different income tax filing deadlines. This is qualitatively different than the mandatory minimum/no mandatory minimum dichotomy in Cedeno. The statute in Cedeno would give an average citizen fair notice that the Commonwealth could charge an offender under the mandatory minimum section or under the non-mandatory minimum section. But the current statute provides two different mandatory minimums for the exact same conduct, which invites massive

confusion among average citizens as to what penalty they would face for the crime of possessing cocaine with intent to distribute.

As noted in the Cedeno opinion, the Supreme Judicial Court has stated that "the principle that no one may be required at his peril to speculate as to the meaning of a criminal statute applies to sentencing as well as to substantive provisions." Commonwealth v. John T. Grant and Sons, 403 Mass. 151 (1988). The present statutory scheme creates significant peril for the average citizen and provides absolutely no guidelines for prosecutorial decisions as to which statutory provision to invoke. This arbitrary and confusing statutory scheme offends due process. The Court should therefore apply the shorter mandatory minimum.

Respectfully submitted,
Moses Ehiabhi,
By his attorney,
Craig E. Collins

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DECEMBER 19, 2014

Certificate of Service

I hereby certify that I have this day served the foregoing memorandum by hand delivery, in court, to the Suffolk County District Attorney's Office.

Craig E. Collins

Craig E. Collins

DECEMBER 19, 2014

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COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT

Suffolk, ss.

Criminal Action
Docket No. 2014-10019

COMMONWEALTH
v.
MOSES EHIABHI

MOTION FOR STAY OF EXECUTION OF SENTENCE

The Defendant, Moses Ehiabhi, Jr. respectfully moves, under Rule 31 of the Massachusetts Rules of Criminal Procedure, that the Court stay the execution of his sentence pending appeal. As grounds therefor, Defendant states that there are highly meritorious appellate issues concerning the denial of Defendant's motion to suppress evidence.

Officer Dodd testified that he ordered the Defendant out of the car to determine his level of intoxication. The evidence is crystal clear that once Mr. Ehiabhi got out of the car, the police did absolutely nothing to test his level of sobriety. Instead the police immediately proceeded to conduct an "inventory search" of his car. The "inventory search" preceded the arrest in this case. This is powerful evidence of pretext. South Dakota v. Opperman, 428 U.S. 364, 376 (1976).

Furthermore, Officer Dodd testified that, as a matter of personal policy, he prefers to tow and impound cars, as opposed to other options available to him under the inventory search policy. This admitted police bias in favor of impoundment/inventory search is itself a violation of the Boston Police

Department's Inventory Search Policy, as well as of United States Supreme Court and Massachusetts caselaw. Colorado v. Bertine, 479 U.S. 367, 375-376 (1987); Commonwealth v. Garcia, 409 Mass. 675, 679 (1991). As a matter of constitutional law, the police do not get to have a preference in favor of towing and searching the car as opposed to the other options available under the Inventory Search Policy. Bertine, 479 U.S. at 375-376 (decision to impound must be guided by "standardized criteria.").

In addition, serious due process concerns are raised by the very real possibility of police perjury at trial. Sergeant Quinn testified that all crime scene photographs were taken between 2:36 a.m. and 3:11 a.m. on June 27, 2013. Blue sky is clearly visible in several of the photographs, admitted in evidence at trial, which supports an inescapable inference that the pictures were taken at around daybreak. This is directly relevant to the police misconduct issues raised by Mr. Ehiabhi's defense at trial. The first question asked by the jury during its deliberations was "if you believe part of the officers testimony to be a lie, are you to assume all of the testimony to be untruthful." The very real specter of intentional police perjury in this case raises serious due process issues on appeal. United States v. Agurs, 427 U.S. 97 (1976).

Under these circumstances it would be unjust to incarcerate the Defendant while his appeal is pending. WHEREFORE, Defendant respectfully moves that the Court exercise its discretion, pursuant to Rule 31 of the Massachusetts Rules of Criminal Procedure, to stay the execution of his sentence pending appeal.

Respectfully submitted,
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By his attorney,
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DECEMBER 19, 2014

Certificate of Service

I hereby certify that I have this day served the foregoing motion by hand delivery, in court, to the Suffolk County District Attorney's Office.

Craig E. Collins
Craig E. Collins

DECEMBER 19, 2014

12/19/14

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK ss,

SUFFOLK SUPERIOR COURT
DOCKET NO. SUCR2014-10019

COMMONWEALTH

V.

MOSES EHIABHI

COMMONWEALTH'S NOTICE OF APPEAL

The Commonwealth of Massachusetts respectfully appeals the illegal sentence imposed by this Court on December 19, 2014 under M.G.L. ch. 94C § 32A(b). The reasons therefore are that the defendant was indicted under and convicted under M.G.L. ch. 94C § 32A(d).

Respectfully submitted
For the Commonwealth,

DANIEL F. CONLEY
District Attorney
For the Suffolk District

Gretchen P. Sherwood
Assistant District Attorney
BBO #: 676938
One Bulfinch Place
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(617) 619-4172

Dated: December 19, 2014

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK ss,

SUFFOLK SUPERIOR COURT
DOCKET NO. SUCR2014-10019

COMMONWEALTH

V.

MOSES EHIABHI

COMMONWEALTH'S NOTICE OF APPEAL

The Commonwealth of Massachusetts, pursuant to Mass. R. App. P. 3 and 4, hereby respectfully appeals the judgment of this Court entered on December 19, 2014, allowing the Defendant's Motion to Stay his sentence.

Respectfully submitted
For the Commonwealth,

DANIEL F. CONLEY
District Attorney
For the Suffolk District

Gretchen P. Sherwood
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Dated: December 19, 2014

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

SUFFOLK, ss 2015-P-314

COMMONWEALTH,
Appellee

v.

MOSES EHIABHI

Defendant-appellant

JOINT MOTION TO EXPAND THE RECORD PURSUANT TO MASS. R. APP. P. 8(e)

The parties respectfully and jointly move to expand the record by adding the following document which is attached to this motion:

1. November 4, 2014, transcript of the hearing on the defendant's motion to suppress.

As grounds therefor:

1. The Superior Court transmitted seven volumes of transcripts to this Court, which this Court received on July 29, 2016. Notably, this Court opened a new docket number upon receipt of these transcripts (No. 2016-P-1044), even though the case had already been docketed under number 2015-P-314. The defendant intends to file a motion to consolidate No. 2016-P-1044 with No. 2015-P-314.

2. The attached volume of transcript was not transmitted by the Superior Court.

3. The attached volume of transcript is necessary for the defendant to litigate on appeal a claim that his motion to suppress was improperly denied.

4. Massachusetts Rule of Appellate Procedure 8(e) states in relevant part, "If anything material to either party is omitted from the record . . . the appellate court . . . may direct that the omission . . . be corrected, and if necessary that a supplemental record be certified and transmitted."

8. It would be procedurally efficient for this Court to grant this joint motion to expand the record with the requested document.

Wherefore, the parties respectfully request that this Court expand the record to include the attached November 4, 2014, transcript of the hearing on the defendant's motion to suppress.

Respectfully submitted,

/s/ Sarah E. Dolven

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COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

SUFFOLK, ss 2015-P-314

COMMONWEALTH,
Appellee

v.

MOSES EHIABHI

Defendant-appellant

PARTIES' STIPULATION TO CORRECT AN ERRONEOUS TRANSCRIPT CAPTION PURSUANT TO MASS. R. APP. P. 8(e)

Pursuant to Mass. R. App. P. 8(e), the defendant and the Commonwealth hereby agree that the December 15, 2014, transcript captioned "motion in limine to preclude reference to officer injury and motion in limine to preclude hearsay evidence before the honorable Joan N. Feeney," is incorrect. The caption of the transcript should read "part one of day two of trial proceedings." The parties agree that the transcription of the proceedings on that day is broken into two separate volumes of transcript, and that the transcript at issue is a transcription of the first part of the second day of trial proceedings (the caption for the other volume of transcript from December 15, 2014, is captioned "portion of day two of

trial proceedings"). Additionally, the presiding justice was the Honorable Elizabeth Fahey, not Joan N. Feeney.

Respectfully submitted,

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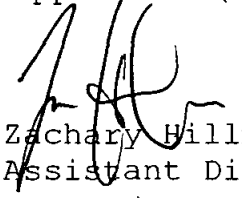
CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the rules of court that pertain to the filing of briefs, including those rules specified in Mass. R. App. P. 16(k).



Zachary Hillman
Assistant District Attorney

No. 2015-P-0314

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

COMMONWEALTH OF MASSACHUSETTS,
Appellant,

V.

MOSES EHIABHI,
Defendant-Appellee

BRIEF AND RECORD APPENDIX FOR THE COMMONWEALTH ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

SUFFOLK COUNTY